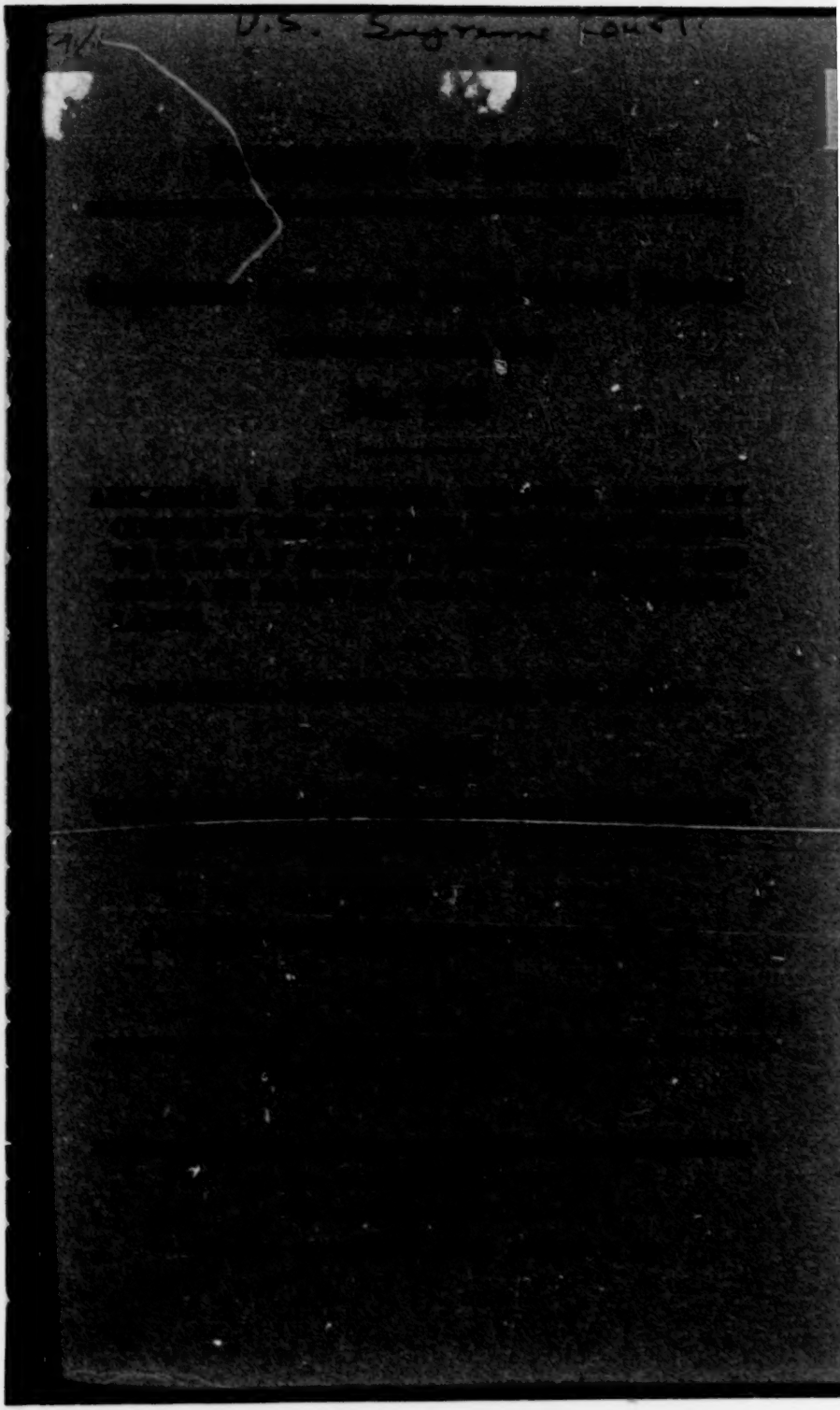

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 125

ARKANSAS & LOUISIANA MISSOURI RAILWAY COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; GULF, COLORADO AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

AMARILLO-BORGER EXPRESS, INC., ET AL.

No. 224

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

AMARILLO-BORGER EXPRESS, INC., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 7, 1956

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[fol. 1] Caption omitted

[fol. 2] **IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION**

Civil Action No. 6289

AMARILLO-BORGER EXPRESS, INC., ET AL

vs.

UNITED STATES OF AMERICA

ORIGINAL COMPLAINT

To the Said Honorable Court:

Come now: Amarillo-Borger Express, Inc., a Texas corporation, with its principal offices in Amarillo, Texas;

Best Motor Freight, an Arkansas Corporation, with its principal offices in Dallas, Texas;

Knaus Truck Line, Inc., a Missouri corporation, with its principal offices in Kansas City, Missouri;

Leeway Motor Freight, Inc., a Delaware corporation, with its principal place of business in Oklahoma City, Oklahoma;

Merchant's Fast Motor Lines, Inc., a Delaware Corporation, with its principal place of business in Abilene, Texas;

Strickland Transportation Company, Inc., a Texas corporation, domiciled and with its principal place of business in Dallas, Texas;

Sunset Motor Lines, Inc., a Texas corporation, with its home office and principal place of business in San Angelo, Texas; and

Yellow Transit Freight Lines, Inc., an Indiana Corporation, with its principal place of business in Kansas City, Missouri.

[fol. 3] Each of said concerns is a Complainant herein. Each is a common carrier of property by motor vehicle as that term is defined in the Interstate Commerce Act. Each is authorized to transport and does transport carbon black in interstate commerce within the territory hereinafter described. Each has a justiciable interest in the matters hereinafter set out.

Complainants bring this action against the United States of America to annul and set aside an order of the Interstate Commerce Commission. The order involved is not one for the payment of money. In support of this action, Complainants here show:

I

This is an action brought under Sections 1336, 1398, 2284, and 2321-2325 of Title 28, United States Code, to set aside and annul an order by the Commission which said order was entered by the Interstate Commerce Commission purporting to act under the provisions of Section 15(7), Title 49, United States Code, but which action (for reasons hereinafter stated) was capricious, arbitrary, transcended the statutory and administrative power of the Commission and constituted an abuse of the discretion confided to the Commission. Complainant Strickland Transportation Company, Inc., is domiciled and has its principal place of business in Dallas, Texas, Dallas, Texas, is within the Dallas Division of the United States District Court for the Northern District of Texas. Hence, venue of this action is in this Court.

II

The subject matter out of which this controversy arose is carbon black and the freight rates applicable thereto.

This commodity is produced almost exclusively in that portion of the United States known in traffic circles as the Southwestern area. Texas is a leading producer. The principal consumers are tire manufacturers. One of the chief consuming points is Akron, Ohio.

Prior to 1954, the rail carriers and the motor carriers [fol. 4] had maintained on carbon black, a scale of rates that were substantially the same. A typical illustration was the rate from shipping points located in the Texas Panhandle to Akron, Ohio. The pre-1954 rate via motor was $1.53 per hundred pounds. The rail rate was approximately $1.56. (The difference was because of the difference in general increases.)

Early in 1954 the rail carriers published schedules which provided for them a differential under the motor carriers. As an illustration, the rail rate from Panhandle origins to

Akron, Ohio, was reduced to $1.4785 per hundred pounds, or 5.15¢ below the motor carrier rate. This reduction was permitted to become effective.

Thereafter, the motor carriers, including complainants, filed schedules designed to meet this new scale and to restore the parity that had theretofore existed. Complainants' schedules were, however (upon petition of the rail carriers) suspended by the Interstate Commerce Commission. The Commission ordered an investigation, and hearing was had in July, 1954. The examiner hearing the matter recommended that the Commission find the motor carriers' reduction justified and lawful. The rail carriers filed exceptions to the report and the matter is still pending and undecided before the Interstate Commerce Commission. The seven months' period for suspension having expired the motor carriers (as is customary in such cases) agreed that the period of suspension would be extended until the matter was determined by the Commission. The effect of this is to freeze the motor carrier rates at their pre-1954 level until the termination of the Commission's investigation.

Following this, and by tariffs published to become effective September 24, 1955, the rail carriers (though already lower than the motor carriers as heretofore shown) proposed to establish a new schedule of rates drastically reduced below the rails' own then reduced scale. A typical illustration is the rates from the Panhandle area to Akron, [fol. 5] Ohio. Under the rails first reduced scale (which motor carriers have not been permitted to reach) the rate was $1.4785 per hundred pounds. The new schedule proposes a rate of $1.33 per hundred pounds. This, as opposed to complainants' frozen rate of $1.53.

III

The motor carriers, including these complainants, acting by and through their several tariff bureaus (Middlewest Motor Freight Bureau, Southwestern Motor Freight Bureau, Inc., Southern Motor Carriers Rate Conference, and others) timely filed petitions with the Interstate Commerce Commission, asking that the Commission suspend the reduced schedules by the rail carriers because they were

unlawful in that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation policy. Replies thereto were filed by interested parties and a conference had on the matter before the Suspension Board of Interstate Commerce Commission on September 21, 1955, in Washington, D. C.

IV

Thereafter, and on September 23, 1955, the Interstate Commerce Commission issued its order sustaining the petition of the motor carriers, including these complainants, suspending the proposed new schedules and directing an investigation. Said order of the Commission is here photographically reproduced as follows:

[fol. 6] Corrected Order of Interstate Commerce Commission

At a Session of the Interstate Commerce Commission, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 23rd day of September, A. D., 1955.

Investigation and Suspension Docket No. 6476

Carbon Black—Southwest to U.S.A. & Canada

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective September 24, 1955, and later, designated as follows:
F. C. Kratzmeir, Agent, I.C.C. 3744:

In Supplement 157 thereto, on page 8 thereof, Item 75-A insofar as it would expire rates referenced encircled "E" held in force by reason of this suspension or make effective rates referenced encircled "226" scheduled to replace such expiring rates, throughout the tariff.

In Supplement 161 thereto, on pages 2 through 29 thereof, all COLUMN D rates, on page 24 thereof, Note A and the explanation thereof, also, on pages 25 through 29 thereof, Note B and the explanation thereof;

In Supplement 163 thereto, on pages 5 through 27 thereof, all COLUMN D rates, on pages 28 through 32 thereof, in ITEMS 220-N, 222-N, 224-M, 226-L, 228-L, 230-L, 232-K, 233-G and 234-J, all COLUMN D rates, on page 27 thereof, Note A and explanation thereof, also, on pages 28 through 32 thereof, Note B and explanation thereof;

Supplement 164 in full;

In Supplement 165 thereto, on pages 2 through 7 thereof, all COLUMN D rates, on pages 3, 4 and 6 thereof, changes in headings insofar as they remove expiration reference encircled "E" applicable in connection with rates held in force by reason of this suspension.

J. F. Brown, Agent, I.C.C. 851:

In Supplement 20 thereto, on pages 6 and 7 thereof, in ITEM 4320-B, all reduced rates, also in Item 4340-B, COL. D rates;

In Supplement 24 thereto, on pages 9 and 10 thereof, in ITEM 4320-B, all rates subject to min. 65,000 pounds, also in ITEM 4340-B, all COL. D rates.

[fol. 7] J. F. Brown, Agent, I.C.C. 865:

In Supplements 1 and 2 thereto, on page 3 thereof, in ITEM 635-A, all COL. D rates;

In Supplement 4 thereto, on page 3 thereof, in ITEM 635-B, all COL. D rates.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the

Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, that the use thereof on interstate and foreign commerce be deferred to and including April 23, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Division 2, acting as an appellate division.

(Seal) Harold D. McCoy, Secretary.

[fol. 8]

V

Pursuant to its order of September 23, 1955, the Commission did under date of November 1, 1955, order that a hearing be had on the issues involved, said hearing to commence at Dallas, Texas, on November 29, 1955.

VI

Thereafter, on November 14, 1955, the Commission, without any further hearing, entered an order which is photographically reproduced as follows:

[fol. 9] Order of Interstate Commerce Commission—November 14, 1955

At a Session of the Interstate Commerce Commission, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 14th day of November, A.D., 1955.

Investigation and Suspension Docket No. 6476

Carbon Black—Southwest to U.S.A. & Canada

It appearing, That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956;

It further appearing, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

It is ordered, That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, Division 2, acting as an appellate division.

(Seal) Harold D. McCoy, Secretary.

[fol. 10] The effect of the order of November 14, 1955, is to permit the assailed schedules to become effective, thereby changing the status quo while the investigation as to their lawfulness is being continued.

VII

The action of the Commission in entering the order of November 14, 1955, is arbitrary, capricious, in contravention of the Commission's statutory and administrative power and constitutes an abuse of the discretion confided in the Commission pursuant to Section 15(7), Part I, Interstate Commerce Act because:

(1) The order shows on its face that it was entered merely because the rail respondents requested it.

(2) There is an entire lack of the basic or essential findings of fact required under the law to support an order of the Interstate Commerce Commission.

(3) The Commission does not make any effort in its order of November 14, 1955, to set aside the findings of fact made by it in its order of September 23, 1955. On the contrary, the facts found to exist, in the order of September 23, 1955, are, by necessary implication, reaffirmed as findings of fact by the Commission in its order of November 14, 1955.

(4) By the very nature of the findings made by the Interstate Commerce Commission it is manifest that the Commission has found that the rates proposed by the rail carriers named in the order are probably unlawful; that they would, if permitted to become effective, result in unfair and destructive competitive practices in contravention of the National Transportation Policy. It is further manifest by the very nature of the facts found that immediate and irreparable injury will be done to the complainants herein if the status quo be not preserved during the period of the investigation. Hence, the Commission abused its discretion in withdrawing from the complainants the protection of the suspension order.

[fol. 11]

VIII

Under date of November 16, 1955, the Interstate Commerce Commission issued an order indefinitely postponing the hearing which had been set for November 29, 1955, to inquire into the lawfulness of said rates. The order of indefinite postponement recited that it was done at the request of the respondent railroads.

IX

Complainants here show that although the order here attacked was issued, as stated, on November 14, 1955, complainants herein did not learn of said order having been issued until the latter part of that week and then only by indirection. Diligent inquiries were promptly made but it was not until Monday, November 21, 1955, that complainants herein were able to secure a copy of said order. This suit is filed with all possible diligence following receipt of the intelligence and learning of the basis (or lack of it) for the Commission's action.

X

Here the complainants show to the Court that immediate and irreparable injury is certain to ensue to the complainants if the order here under attack is permitted to become effective. In this connection the complainants show to the Court that unless a temporary restraining order and a temporary injunction is issued the reduced rates will be permitted to become effective at midnight, on November 23, 1955. If this is permitted to happen, complainants have already been advised that carbon black traffic heretofore and now being handled by them will be diverted to railroads. Complainants herein are presently receiving revenues in excess of $1,000.00 per day for transporting carbon black traffic affected by this proceeding. As stated, they are threatened with immediate loss of the whole of this revenue which loss will continue and which is irreparable.

XI

Complainants here show to the Court that carbon black is [fol. 12] a very important commodity being handled in the service of complainants. The movement of their traffic is predominantly from the North and East to the South and Southwest. Carbon black assumes an importance even out of proportion to its volume because it is one of the very few commodities available for transportation from the Southwestern areas to gateways in the North, such as St. Louis, Chicago and Memphis. Diversion of this traffic, even if temporary, and even if confined to the period while the lawfulness of the rail rates are under investigation, would

produce a severe and substantial financial loss to these complainants. By the very nature of the loss it is irreparable because it could never be recovered. Since the Commission has now indefinitely postponed any hearing this loss would continue to accrue for an indefinite time in the future. Processes of the Interstate Commerce Commission are, at best, slow. In this connection complainants show that the motor carrier rates under suspension have been under investigation for 18 months and no decision is yet in sight.

XII

Complainants here show that irreparable damage to complainants is so certain and so immediate that the Judge to whom this petition is presented should issue forthwith a temporary restraining order to preserve the status quo until such time as the three-judge court may be convened to hear the application for interlocutory injunction. In addition to the facts heretofore recited, complainants show that an immediate temporary restraining order is imperative because:

(1) The order of the Commission under attack permits the schedules of the rail carriers, already published, to become effective at midnight, November 23, 1955.

(2) Once the schedule becomes effective there is considerable doubt whether even a subsequent setting aside of the Commission's order could, in law, have the effect of cancelling the schedules.

(3) While the statute confides to the Commission the dis- [fol. 13] cretion as to whether or not a schedule is to be suspended, the Commission is obligated under the law to exercise discretion. Where, as here, the Commission has found as facts that the assailed schedules are probably unlawful and will likely result in unfair, destructive competitive practices; and where, as here, it necessarily follows that such action would cause immediate and irreparable injury to the competing motor carriers; and where, as here, the Commission based upon the facts above stated, did order the rates suspended, it is an abuse of the Commission's discretion, without fact findings and without hearing, to withdraw from the complainants the protection of the

preservation of the status quo; which protection the facts found entitle the complainants to receive.

(5) The grant of the temporary restraining order and an interlocutory injunction would mean preservation of the status quo until such time as the issues of law herein could be determined. As hereinbefore shown, the rail carrier respondents already enjoy some rate differential in their favor by reason of the prior investigation and suspension proceeding not yet determined. The considered traffic is now moving freely by both means of transportation, rail and motor carrier. Furthermore, the assailed rates have been under suspension by virtue of the Commission's order for the past 49 days and the only effect of a temporary restraining order would be to keep in effect for a few days longer the order of the Commission dated September 23, 1955, unmodified by the order of November 14, 1955. Therefore, no injury could result to any person adversely interested in this controversy.

Wherefore, premises considered, complainants pray the Court as follows:

(1) That a three-judge court be convened pursuant to Sections 2284, 2321-2325 of the Judicial Code.

(2) That pending the assembling of the court and to prevent irreparable damage the District Judge to whom this [fols. 14-15] petition is presented forthwith issue a temporary restraining order which shall remain in effect only until the hearing and determination by the full court on the application for interlocutory injunction and which shall suspend temporarily and enjoin the effectiveness, temporarily, the order of November 14, 1955, so far as it purported to modify the Commission's order of September 23, 1955.

(3) That the three-judge court set down for hearing at the earliest practicable date the matter of the issuance of an interlocutory injunction continuing in effect the relief sought by the temporary restraining order until such time as final judgment on the merits of this complaint can be heard and determined by the said three-judge court.

(4) That on final hearing hereof, this Court issue an

order annulling, vacating, and setting aside the order of the Interstate Commerce Commission dated November 14, 1955, and decreeing that the order of September 23, 1955, shall remain in effect unmodified by the purported action of November 14, 1955, here assailed.

(5) That appropriate process issue in connection with all relief sought herein, interlocutory or final.

(6) That complainants herein have such other and further relief at law or in equity to which they may be justly entitled under the law and the facts.

Respectfully submitted, Ralph W. Currie, Attorney for Complainants

---

Duly sworn to by Virgil T. Springer. Jurat ommitted in printing.

[fol. 15a] In United States District Court

Order Denying Temporary Restraining Order; etc.—November 23, 1955

On this 23rd day of November, 1955, there having been presented to the undersigned District Judge the request of the complainants herein for a temporary restraining order and request for setting on plaintiff's application for interlocutory injunction; complainants appearing by counsel and the defendant appearing by Honorable John C. Ford, Assistant United States Attorney:

And it appearing to the Court that no damage will be done to the complainants until such time as the application for interlocutory injunction can be heard, and that said application for interlocutory injunction should be heard at the earliest practical date, which date the Court here fixes as December 9, 1955 at 10:00 o'clock before noon:

It is, therefore, ordered that plaintiff's application for temporary restraining order be denied, but that its application for interlocutory injunction be and the same is hereby set to be heard by a three Judge Court pursuant to law on

December 9, 1955 beginning at 10:00 o'clock A.M. in the United States District Courtroom in Dallas, Texas.

Entered this 23rd day of November, 1955.

Wm. H. Atwell, United States District Judge

Approved as to form:

Ralph W. Currie,
Attorney for Complainants
John C. Ford, Assistant
United States Attorney
Attorney for Defendant

[fol. 16] In United States District Court

Notice of Motion by the United States of America

Please take notice that the United States of America will bring on the attached motion to be heard at the hearing set for December 12, 1955, in the above-entitled action.

(S) Stanley M. Barnes, Assistant Attorney General; (S) Heard L. Floore, United States Attorney; (S) John C. Ford, Assistant United States Attorney; (S) James E. Kilday, (S) Albert Parker, (S) Earl E. Pollock, Attorneys, Department of Justice.

Attorneys for Defendant United States of America

[fols. 17-27] IN UNITED STATES DISTRICT COURT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

Civil Action No. 6289

AMARILLO-BORGER EXPRESS, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION, Intervening Defendant.

MOTION TO DISMISS BY UNITED STATES OF AMERICA

Now comes the United States of America, defendant in the above-entitled action, and moves the Court to dismiss the complaint for lack of jurisdiction of the subject matter, on the grounds: (1) that the suspension of new rate schedules is a matter wholly within the discretion of the Interstate Commerce Commission; (2) that the plaintiffs have not exhausted their administrative remedies; (3) that the relief sought by the plaintiffs is now beyond the power of the Commission to grant.

(S) Stanley M. Barnes, Assistant Attorney General; (S) Heard L. Floore, United States Attorney; (S) John C. Ford, Assistant United States Attorney; (S) James E. Kilday, (S) Albert Parker, (S) Earl E. Pollock, Attorneys, Department of Justice.

Attorneys for Defendant United States of America

[fol. 28] IN UNITED STATES DISTRICT COURT

MOTION OF THE SOUTHWESTERN RAILROADS FOR LEAVE TO INTERVENE

Come now the Southwestern Railroads, as listed in Appendix A to the Motion to Dismiss and Answer copies of which are hereto attached, and move for leave to intervene

as Defendants in this action in order to assert claims and defense set forth in their Motion to Dismiss and Answer and to secure the relief sought in such pleading on the ground that their rates on carbon black are under attack in this action and that representation of their interests by existing parties is or may be inadequate and they will be bound by a judgment in the action.

William R. McDowell, Attorney for Southwestern Railroads, Texas & Pacific Building, 1025 Elm Street, Dallas, Texas.

[fol. 29] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS

To the Honorable Judges of said Court:

Come now, the Southwestern Railroads, Party-Defendants, and file this their Motion to Dismiss the above-entitled and numbered cause for reasons as follows:

I

This Court is without jurisdiction in this action because the power of granting or denying suspension of new rates as authorized and provided in Section 15(7) of the Interstate Commerce Act (49 U.S.C.A. 15(7)) is vested exclusively in the Interstate Commerce Commission and the Court is without power to review the exercise by the Commission of its administrative discretion with respect thereto.

II

The complaint fails to state a claim upon which relief can be granted because the order involved is an interlocutory one, preliminary to investigation and to a determination of the matter to be investigated; hence, it is not a final and definitive order which is reviewable by the Court.

Wherefore, the Southwestern Railroads, Party-Defendants, pray that the complaint be dismissed.

William R. McDowell, Attorney for Southwestern Railroads.

[fol. 30] APPENDIX A TO MOTION TO DISMISS

The Southwestern Railroads are as follows:

Arkansas & Louisiana Missouri Railway Company.
The Atchison, Topeka and Santa Fe Railway Company.
Gulf, Colorado and Santa Fe Railway Company.
Panhandle and Santa Fe Railway Company.
Chicago, Rock Island and Pacific Railroad Company.
The Colorado and Southern Railway Company.
Fort Worth and Denver City Railway Company.
Illinois Central Railroad Company.
The Kansas City Southern Railway Company.
Louisiana & Arkansas Railway Company.
The Arkansas Western Railway Company.
Fort Smith and Van Buren Railway Company.
Midland Valley Railroad Company.
Kansas, Oklahoma & Gulf Railway Company.
Oklahoma City-Ada-Atoka Railway Company.
Missouri-Kansas-Texas Railroad Company.
Missouri-Kansas-Texas Railroad Company of Texas.
Beaver, Meade and Englewood Railroad Company.
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee).
Asherton and Gulf Railway Company (Guy A. Thompson, Trustee).
Asphalt Belt Railway Company (Guy A. Thompson, Trustee).
The Beaumont, Sour Lake & Western Railway Company (Guy A. Thompson, Trustee).
Doniphan, Kensett & Searcy Railway.
Houston and Brazos Valley Railway Company (Guy A. Thompson, Trustee).
International-Great Northern Railroad Company (Guy A. Thompson, Trustee).
Natchez & Southern Railway Company (Guy A. Thompson, Trustee).
New Iberia & Northern Railroad Company (Guy A. Thompson, Trustee).
New Orleans and Lower Coast Railroad Company.
New Orleans, Texas & Mexico Railway Company (Guy A. Thompson, Trustee).

The Orange & Northwestern Railroad Company (Guy A. Thompson, Trustee).

[fol. 31] Rio Grande City Railway Company (Guy A. Thompson, Trustee).

The St. Louis, Brownsville and Mexico Railway Company (Guy A. Thompson, Trustee).

San Antonio Southern Railway Company (Guy A. Thompson, Trustee).

San Antonio, Uvalde & Gulf Railroad Company (Guy A. Thompson, Trustee).

San Benito and Rio Grand Valley Railway Company (Guy A. Thompson, Trustee).

Sugar Land Railway Company (Guy A. Thompson, Trustee).

St. Louis Southwestern Railway Company.

St. Louis-San Francisco Railway Company.

St. Louis, San Francisco and Texas Railway Company.

Quanah, Acme & Pacific Railway Company.

Southern Pacific Company.

Texas and New Orleans Railroad Company.

The Texas and Pacific Railway Company.

Abilene & Southern Railway Company.

The Denison and Pacific Suburban Railway Company.

Texas-New Mexico Railway Company.

Texas Short Line Railway Company.

The Weatherford, Mineral Wells and Northwestern Railway Company.

The Texas Mexican Railway Company.

[fol. 32] IN UNITED STATES DISTRICT COURT

ANSWER OF THE SOUTHWESTERN RAILROADS

The Southwestern Railroads, as listed in Appendix A hereto attached, and intervening Defendants in the above-entitled and numbered action, without waiving their Motion to Dismiss, and now, and at all times hereafter, saving and reserving to themselves any and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto, or

unto so much as such parts thereof as they are advised that it is material for them to answer, answer and say:

First Defense

The Southwestern Railroads allege that this Court is without jurisdiction of this action for the reason that the power of suspension of new rates as authorized and provided by Section 15(7) of the Interstate Commerce Act (49 U.S.C.A. 15(7)) is vested exclusively in the Commission and the Court is without power to review the exercise by the Commission of its administrative discretion with respect thereto. The Southwestern Railroads further allege that the complaint fails to state a cause of action upon which relief may be granted.

Second Defense

Further answering the complaint, without waiving their Motion to Dismiss and the foregoing First Defense, the Southwestern Railroads answer and say:

[fol. 33] I

Answering the allegations of the first three unnumbered paragraphs of the complaint, the Southwestern Railroads admit the legal entity of the complainants, their principal place of business, their status as common carriers of property by motor vehicle, and the fact that each is authorized and does transport carbon black in interstate commerce within and from the territory involved in the complaint, but they deny that the complainants have a justiciable interest in this action.

II

Answering the allegations of the fourth unnumbered paragraph of the complaint, the Southwestern Railroads admit the same.

III

Answering the allegations of Paragraph I of the complaint, the Southwestern Railroads admit that this action is brought under the legal authorities referred to in said paragraph to set aside and annul a certain order entered by the Interstate Commerce Commission, but allege the

action is premature, and consequently, improperly brought. The Southwestern Railroads deny that the entry of said order was capricious, arbitrary or transcendent of the statutory and administrative power of the Commission or an abuse of the discretion confided to the Commission. To the contrary, the Southwestern Railroads allege that said order was legally, regularly, and properly entered in the exercise of the Commission's sound discretion and judgment, that it was duly filed and served, all pursuant to Section 15(7) of the Interstate Commerce Act (49 U.S.C.A. 15(7)), and all other applicable laws.

IV

Answering the allegations of Paragraph II of the complaint, the Southwestern Railroads admit that carbon black is produced almost exclusively in that part of the United States known as the Southwestern Area, that Texas is the [fol. 34] leading producer, that the principal consumers are tire manufacturers, and one of the chief consuming points is Akron, Ohio. The Southwestern Railroads deny that the rail carriers and the motor carriers have maintained, either before or after 1954, a scale of rates which were substantially the same, but allege that the motor carriers have attempted to justify a scale of rates applying on minimum weights of 16,000, 20,000, 22,500, and 28,000 pounds, corresponding to the railroads' scale applying on minimum weights of 25,440, 40,000, 50,000 and 65,000 pounds, respectively. The Southwestern Railroads further allege that the schedules in question provide for a reduction in rates for the transportation of carbon black, minimum weight 65,000 pounds, established upon the request of the National Gas Products Association, an association of the shippers of this commodity, and the Rubber Manufacturers Association, an association of the principal consumers of this commodity, to meet the economic needs of their business, and that the motor carriers can not and do not transport shipments of this weight. The Southwestern Railroads further allege that the action taken by the Commission in other proceedings for the suspension of rates are wholly immaterial and irrelevant to a consideration and determination of the issue presented here.

V

Answering the allegations of Paragraph III of the complaint, the Southwestern Railroads admit that motor carriers, including these complainants, acting by and through their several traffic bureaus, timely filed petitions with the Interstate Commerce Commission requesting the Commission to suspend the rate schedule filed by the railroads, and that replies thereto were filed by interested parties, including the shippers and the railroads. The Southwestern Railroads further admit that a conference was had on the matter before the Suspension Board of the Interstate Commerce Commission on September 21, 1955, in Washington, D.C., [fol. 35] but in this regard allege that despite the fact that the railroads had no notice of the conference and were not represented at the conference, the Suspension Board nevertheless declined to suspend the rate schedules involved here.

VI

Answering the allegations of Paragraphs IV, V, and VI of the complaint, the Southwestern Railroads allege that on the day following the action of the Suspension Board declining to suspend the proposed rate schedules, the motor carriers, including these complainants, without notice to or representation by the railroads, conferred with Division 2 of the Interstate Commerce Commission acting as an appellate division. On the day following this conference, i.e., September 23, 1955, Division 2 issued the order (photographically reproduced as a part of Paragraph IV of the complaint) suspending the proposed schedules and directing an investigation. The Southwestern Railroads further allege that following this order, and on October 13th and 18th, respectively, the National Gas Products Association and the Southwestern and Western Trunk Lines railroads petitioned the Commission for vacation of the suspension ordered by Division 2, to which petitions, replies were filed by the motor carriers, including these complainants. Thereafter, under date of November 1, 1955, the Commission assigned the docket for hearing on November 29, 1955, at Dallas, Texas. In view of the pendency of their petition to vacate the suspension, the Southwestern and Western Trunk

Lines railroads on November 8, 1955, requested a postponement of the hearing. On November 14, 1955, Division 2 of the Commission issued its order (photographically reproduced as a part of Paragraph IV to the complaint) sustaining the petitions of the railroads and the National Gas Products Association, vacating the suspension which it had previously ordered on the basis of the ex parte conference with the motor carriers.

[fol. 36] VII

Answering the allegations of Paragraph VII of the complaint, the Southwestern Railroads deny that the order of November 14, 1955, referred to in said Paragraph is unlawful or void for any of the reasons specified in said Paragraph or for any other reason. The Southwestern Railroads further allege that said order was legally, regularly, and properly entered in the exercise by it of sound discretion and judgment and that it was duly filed and served, all pursuant to the provisions of Section 15(7) of the Interstate Commerce Act (49 U.S.C.A. 15(7)), and all other applicable laws; that the Commission was and is empowered to enter the said order and the Commission did not exceed the authority conferred upon it by law in so doing; that said order is lawful and valid in all respects; that the reasons stated in said order for vacating and setting aside said order of September 23, 1955, are sufficient and meet fully all legal requirements; and that the complainants were duly served with a copy of the order.

The Southwestern Railroads further deny that there were any findings of fact made by Division 2 in its order of September 23, 1955, and allege that the statement "there is reason to believe" that the proposed schedules will have certain effects, which complainants ascribed as findings of fact, resulted from the motor carrier conference of September 22, 1955, with Division 2 of the Commission.

VIII

Answering the allegations of Paragraph VIII of the complaint, the Southwestern Railroads admit that under the date of November 16, 1955, the Interstate Commerce Com-

mission issued an order postponing the hearing which had been set for November 29, 1955, but deny that the postponement is indefinite, but rather it was postponed to a date to be hereafter fixed since the railroads requested only forty-five days to permit the Commission to act on their pending [fol. 37] petition to vacate the suspension and to permit them time to prepare for a hearing. The hearing has now been reassigned for February 2 and 3, at Dallas, Texas.

IX

Answering the allegations of Paragraph IX of the complaint, the Southwestern Railroads state that they have no information on which to admit or deny the allegations therein contained.

X

Answering the allegations of Paragraph X of the complaint, the Southwestern Railroads deny that any immediate or irreparable injury will ensue to the complainants if the order under attack is permitted to remain in effect.

XI

Answering the allegations of Paragraph XI of the complaint, the Southwestern Railroads admit that carbon black is a commodity being handled in service of complainants, but they have no information on which to admit or deny the allegations with respect to complainants' traffic flow or the importance of carbon black traffic to them. The Southwestern Railroads deny that the order will have the effect of producing substantial and irreparable financial loss to these complainants, and deny that a hearing on the rates has been indefinitely postponed. The Southwestern Railroads further deny that the processes of the Interstate Commerce Commission are slow as evidenced by the action in this case and allege that the time required for the Interstate Commerce Commission to investigate motor carrier rates in other proceedings for suspension are wholly immaterial and irrelevant to a consideration and determination of the issues presented here.

XII

Answering the allegations of Paragraph XII of the complaint, the Southwestern Railroads deny the same.
[fol. 38] Wherefore, the Southwestern Railroads pray that the relief sought by the complainants herein be denied and that the complaint be dismissed.

William R. McDowell, Attorney for Southwestern Railroads

[fols. 39-40] Appendix A to Answer (Copy)
Omitted. Printed side page 30 ante.

[fols. 41-54] In United States District Court

Order Allowing Intervention of Southwestern Railroads as Defendants—December 9, 1955

The Court having considered the Motion of the Southwestern Railroads for Leave to Intervene as Defendants in the above cause, and the Court having considered the Motion to Dismiss and Answer tendered therewith, and it appearing to the Court that the said Southwestern Railroads should be permitted to intervene as prayed, and the Court being duly advised in the premises,

It is Ordered, that the Southwestern Railroads have leave to intervene in this cause and are hereby made party-defendants and to that end, may file their Motion to Dismiss and Answer, and hereafter defend the order involved herein in the same manner and with like effect as if named as an original party.

Dated this the 9th day of December, 1955.

Wm. H. Atwell, United States District Judge

[fol. 55] IN UNITED STATES DISTRICT COURT

MOTION OF THE INTERSTATE COMMERCE COMMISSION FOR LEAVE TO INTERVENE

Pursuant to Rule 24 of the Rules of Civil Procedure, the Interstate Commerce Commission moves for leave to intervene as a party defendant in this action in order to assert the claims and defenses which it deems necessary in support of its action, on the ground that it is entitled to intervene on its own motion and as of right (28 U.S.C. 2323).

Interstate Commerce Commission, Robert W. Ginnane, General Counsel, H. Neil Garson, Attorney.

[fol. 56] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 57] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING INTERVENTION OF INTERSTATE COMMERCE COMMISSION AS DEFENDANT—December 7, 1955

The Court having considered the motion of the Interstate Commerce Commission for leave to intervene as a party defendant in the above cause, and it appearing to the Court that the said Interstate Commerce Commission should be permitted to intervene as prayed, and the Court being duly advised in the premises,

It is ordered, That the Interstate Commerce Commission have leave to intervene in this cause and is hereby made a party defendant, and to that end may file its answer and hereafter defend its order involved herein in the same manner and with like effect as if named as an original party.

Dated, December 7th, 1955.

Wm. H. Atwell, United States District Judge

[fol. 58] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION BY THE INTERSTATE COMMERCE COMMISSION

Please take notice that the Interstate Commerce Commission will bring the attached Motion on to be heard at the regular meeting of the Court set for December 9, 1955.

H. Neil Garson, Attorney, Interstate Commerce Commission, Washington 25, D. C.; Bernard H. English, Attorney, Interstate Commerce Commission, Rm. 2104, 300 West Vickery St., Fort Worth 2, Texas; Robert W. Ginnane, General Counsel, Interstate Commerce Commission.

[fol. 59] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 60] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BY THE INTERSTATE COMMERCE COMMISSION

Now comes the Interstate Commerce Commission, defendant in the above-entitled action, and moves the Court to dismiss the complaint and the motion for interlocutory injunction herein for lack of jurisdiction of the subject matter, for the reason that the action of the Commission complained of in the complaint is within the sole discretion of the Interstate Commerce Commission and for further reason that the plaintiffs have failed to exhaust their administrative remedies.

H. Neil Garson, Attorney, Interstate Commerce Commission, Washington 25, D. C.; Bernard H. English, Attorney, Interstate Commerce Commission, Rm. 2104, 300 West Vickery St., Fort Worth 2, Texas; Robert W. Ginnane, General Counsel, Interstate Commerce Commission.

[fol. 61] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LEE CISNEROS

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared Lee Cisneros, who being by me duly sworn, upon oath says:

My name is Lee Cisneros. I reside in Boston, Massachusetts. I am employed as General Traffic Manager of the Godfrey L. Cabot, Inc. I have been General Traffic Manager of Godfrey L. Cabot, Inc. for five years. Prior to that time I was employed by Cabot Carbon Company, the carbon black producing subsidiary of Godfrey L. Cabot, Inc. at Pampa, Texas, for a period of five years, as Shipping Department Supervisor. Cabot Carbon Company, a wholly-owned subsidiary of Godfrey L. Cabot, Inc., produces carbon black at its eight plants located in Texas, New Mexico, and Louisiana. Carbon black is produced from natural gas and petroleum hydrocarbons generally in the states of Texas, Louisiana, New Mexico, Oklahoma, Arkansas, and Kansas. The bulk of carbon black is consumed in the rubber manufacturing industry, which is primarily located in the territory north of the Ohio River and east of the Mississippi River. Approximately 95% of all carbon black produced in this country is used in the manufacture of rubber goods. The rest is consumed in ink and paint manufacture and other miscellaneous manufactured products. Cabot Carbon Company is a member of the National Gas Products Association. The National Gas Products Association is a voluntary, nonprofit organization consisting of the carbon black manufacturers who produce approximately 95% of all the carbon black manufactured in the United States. I am per-
[fol. 62] sonally associated with National Gas Products Association as a member of the carbon black Traffic Committee. I actively participate in the affairs of that Committee, and I am familiar with the action it takes in connection with rate proposals.

I am familiar with the schedules of railroad rates involved in the orders of the Interstate Commerce Commission dated September 23, 1955, and November 14, 1955, entitled "Investigation and Suspension Docket No. 6476, Carbon Black

—Southwest to U.S.A. and Canada." The rates involved in these schedules developed as a result of a request made by the Traffic Committees of National Gas Products Association and the Rubber Manufacturers Association, for the establishment of a lower basis of railroad rates. The request of the Traffic Committee of the National Gas Products Association was grounded upon the assertion that the rates in effect were unjust, unreasonable, in violation of Section 1 of the Interstate Commerce Act, unduly prejudicial and preferential and in violation of Section 3. The rail carriers entered upon a consideration of our request, numerous public hearings were heard and approximately 20 months later the schedules approved by the rail carriers were filed with the Interstate Commerce Commission, to become effective September 24, 1955. On September 21st a conference was held before the Suspension Board of the Interstate Commerce Commission with respect to these schedules. On September 22, 1955, the Suspension Board declined to suspend, but ordered an investigation as to the reasonableness and lawfulness of the rates. Before the Suspension Board's order could take effect, Division 2 of the Interstate Commerce Commission, acting as an Appellate Division, issued its order of September 23, 1955, suspending the schedules. Following this order, the Traffic Committee of the National Gas Products Association petitioned the Interstate Commerce Commission to vacate the suspension which it had previously ordered. On November 14th the I.C.C. issued its order vacating the suspension and continuing the investigation with the initial hearing set for February 2nd at Dallas, Texas. Following this action the rail carriers filed a supplement which had the effect of placing the rates into effect on November 24, 1955. The rates have been in effect since that time. Since November [fol. 63] 24th, out of approximately 18,000,000 pounds of carbon black originated at our plants moving by both rail and truck, only one diversion from truck to rail, consisting of 60,000 pounds, has been made.

Substantial tonnage moving by truck would seem to indicate that the level of the rate is not the sole determining factor in choosing a method of transport, for example: During the period of January through April, 1954, members of

National Gas Products Association shipped 901 truck loads, totaling 26,544,675 pounds via truck to midwest and eastern states, of which 20,551,857 pounds moved at motor rates higher than the 65,000 pound carload minimum rail rate. In some cases these rates were as much as 22 cents per hundred pounds higher than the rail rate.

Lee Cisneros

Subscribed and sworn to before me, by the said Lee Cisneros, this 12th day of December, 1955, to certify which witness my hand and seal of office.

My commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

(Seal)

[fol. 64] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF HARRY L. BRAND

THE STATE OF TEXAS,
County of Dallas

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared Harry L. Brand, who being by me duly sworn, upon oath says:

My name is Harry L. Brand. I reside in Caldwell, New Jersey, and I am employed as Director of Traffic by The J. M. Huber Corporation. I have been employed by the J. M. Huber Corporation more than sixteen years, the last six of which have been in my present capacity. The J. M. Huber Corporation produces carbon black in plants located at Eldon and Borger, Texas. I have noticed no diversion of carbon black from truck to rail since reduced rail rates became effective on November 24, 1955.

I have read the affidavit signed by Lee Cisneros of Godfrey L. Cabot, Inc., Boston, Mass., and concur fully in the statements contained therein.

Harry L. Brand

Subscribed and sworn to before me by the said Harry L. Brand, this 12th day of December, 1955, to certify which witness my hand and seal of office.

My Commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

(Seal)

[fol. 65] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. D. SPRUILL

THE STATE OF TEXAS,
County of Dallas

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared J. D. Spruill, who being by me duly sworn, upon oath says:

My name is J. D. Spruill. I reside at Garrison, New York, and I am General Traffic Manager of Columbian Carbon Co., New York. I have been employed by the Columbian Carbon Co. for the past six months. Prior to that time I was traffic manager for Binney & Smith, Inc., New York, N. Y., distributors of Carbon Black produced by Columbian Carbon Co. at plants located in Arkansas, Kansas, Louisiana, New Mexico, and Texas. Columbian Carbon Co. is a member of the National Gas Products Association. I am not aware of the diversion of carbon black tonnage from the truck carriers to the rail carriers because of the rail rates effective November 24, 1955.

I have read the affidavit of Lee Cisneros as made in this case, and subscribe to statements and information submitted.

J. D. Spruill

Subscribed and sworn to before me by the said J. D. Spruill, this 12th day of December, 1955, to certify which witness my hand and seal of office.

My commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

(Seal)

[fol. 66] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF R. J. BARLOW

THE STATE OF TEXAS,
County of Dallas

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared R. J. Barlow, who being by me duly sworn, upon oath says:

My name is R. J. Barlow. I reside in Amarillo, Texas. I am Traffic Manager for Continental Carbon Company and Continental Blacks, Inc. I have been Traffic Manager of Continental Carbon Company for the past five years and was Assistant Traffic Manager for the company for three years prior. Continental now owns and operates carbon black plants located in Texas, Oklahoma, New Mexico and Louisiana.

Continental is a member of the Traffic Committee of the National Gas Products Association. I am presently chairman of this committee and am familiar with the activities of the Committee actively participating in the affairs of the Committee on rate matters and particularly the rate adjustment causing the action at hand, namely, Investigation and Suspension Docket No. 6476, Carbon Black—Southwest to U.S.A. and Canada.

I have read the affidavit of Lee Cisneros, General Traffic Manager of Godfrey L. Cabot, Inc. concerning in general, (1) production, and distribution of carbon black; (2) the National Gas Production, Traffic Committee activities; (3) the handling of the case at hand by procedures outlined by Interstate Commerce Commission; (4) the statement of

truck shipments for January through April, 1954; and concur in said affidavit to that extent.

[fol. 67] The reduced rail rates that became effective on November 25, 1955, have not caused a diversion of traffic to the railroads from the motor carriers since they became effective, even though in most cases the rail rates are lower than the truck rates.

R. J. Barlow

Subscribed and sworn to before me by the said R. J. Barlow, this 12th day of December, 1955, to certify which witness my hand and seal of office.

My commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

(Seal)

[fol. 68] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. C. T. UTLEY

THE STATE OF TEXAS,
County of Dallas

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared W. C. T. Utley, who being by me duly sworn, upon oath says:

My name is W. C. T. Utley. I reside in Fort Worth, Texas, and I am employed as Traffic Manager of the Sid Richardson Carbon Co. I have been Traffic Manager of Sid Richardson Carbon Co. for two years and seven months.

Sid Richardson Carbon Co. ships carbon black by both rail carrier and motor carrier from its plant at Sid Richardson, Texas to the destinations involved in these proceedings.

Sid Richardson Carbon Co. is a member of the Natural Gas Products Association. I am personally associated with the Natural Gas Products Association as a member of the carbon black Traffic Committee. I actively participate in the affairs of that Committee and I am familiar with the action it takes in connection with rate proposals.

I am familiar with the schedules of railroad rates involved in the orders of the Interstate Commerce Commission dated September 23, 1955, and November 14, 1955, entitled "Investigation and Suspension Docket No. 6476, Carbon Black —Southwest to U.S.A. and Canada."

I have read the affidavit submitted by Lee Cisneros, Traffic Manager of Godfrey L. Cabot, Inc. in this case and I subscribe to and concur in all statements made in this affidavit as they relate to actions taken and information submitted by the Natural Gas Products Association.

[fol. 69] In the performance of my duties as Traffic Manager of Sid Richardson Carbon Co. I have personal knowledge of routings and types of carriers used in the transportation of carbon black from our plant to destinations involved in this case. Since November 24, 1955 there has not been any diversion of traffic from rail carriers to motor carriers in such shipments made by Sid Richardson Carbon Co.

W. C. T. Utley

Subscribed and sworn to before me by the said W. C. T. Utley, this 12th day of December, 1955, to certify which witness my hand and seal of office.

My commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

(Seal)

[fol. 70] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF ARTHUR B. STRUNK

THE STATE OF TEXAS,
County of Dallas

Before me, Beatrice Holloway, a notary public in and for Dallas County, Texas, on this day personally appeared Arthur B. Strunk, who being my me duly sworn, upon oath says:

My name is Arthur B. Strunk. I am a resident of St. Louis, Missouri. I am employed by the Southwestern

Freight Bureau at St. Louis, Missouri. The Southwestern Freight Bureau is a voluntary, non-profit association of the Southwestern Rail Lines organized and operating under Section 5(a) of the Interstate Commerce Act. Among its duties it has the responsibility of preparing and publishing the joint line rate schedules for its members. I am a member of the Rate Committee of the Southwestern Freight Bureau and in such capacity I am familiar with the preparation and filing of rate schedules with the Interstate Commerce Commission. I have made a complete study and am thoroughly familiar with the rate schedules involved in the Interstate Commerce Commission's orders of September 23, 1955, and November 14, 1955, entitled: "Investigation and Suspension Docket No. 6476 Carbon Black—Southwest to U.S.A. & Canada."

Prior to the filing with the Commission of the rate schedules involved in this case, all of the published rates on carbon black were subject to an expiration date of December 31, 1955. The rate schedules involved here were not subject to any expiration date and superseded and canceled the prior 65,000 pound rates on carbon black which were subject to the expiration date of December 31, 1955. The order of September 23, 1955, suspended this schedule of rates but [fol. 71] continued in effect the rate on the 65,000 pound minimum weight subject to expiration date of December 31, 1955. The order of the Commission dated November 14, 1955, vacated the suspension of the schedule previously ordered by the Commission. Following this action the Southwestern Freight Bureau filed a rate schedule which had the effect of restoring as of November 24th the schedules which were suspended by the Commission. The Southwestern Freight Bureau thereafter published a new tariff schedule on November 28th, known as Supplement 170, bringing forward the 65,000 pound minimum rates together with other rates at lower minimum weights, all of which are not subject to an expiration date. This schedule of rates does not become effective until December 31, 1955.

If the order of the Commission dated November 14, 1955, is annulled the effect will be to cancel all rail rates on carbon black from the Southwest on 65,000 pound minimum until such time as Supplement 170 becomes effective on December

31, 1955. Furthermore, since the rate schedules contained in Supplement 170 are identical to those suspended in the Order of September 23, 1955, there is grave doubt that there will be any rail rates from the Southwest effective on a 65,000 pound minimum after that date.

Arthur B. Strunk.

Subscribed and sworn to before me, by the said Arthur B. Strunk, this 12th day of December, 1955, to certify which witness my hand and seal of office. My commission expires June 1, 1957.

Beatrice Holloway, Notary Public, Dallas County, Texas.

[fol. 72] IN UNITED STATES DISTRICT COURT

STATE OF TEXAS,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared Dean McCoy, who, being by me duly sworn, states on oath as follows:

AFFIDAVIT

My name is Dean McCoy. I am Traffic Manager of Lee-Way Motor Freight, Inc., one of the complainants in the instant proceeding. L.W.M.F., Inc. (hereinafter identified as Lee Way) is a regular route motor common carrier of general commodities, operating in interstate and foreign commerce. It operates from and to St. Louis on the East, Kansas City on the North thru Tulsa and Oklahoma City to Amarillo, Borger, Dallas, Ft. Worth, Houston and San Antonio, on the west and south. Lee Way was one of the first motor carriers to transport carbon black from the Texas panhandle to Eastern manufacturing centers. For about 20 years it has been one of the principal motor carriers of carbon black. Lee Way's records show that from Jan. 1, 1955 through October 31, it originated 1640 loads of carbon black, weighing 45,920,000 lbs. The through revenue on this traffic amounted to more than $570,000.00.

In my association with carbon black producers and receivers over the past 10 years it is my judgment that the only factor considered in routing carbon black—truck or rail—is the level of the rates in cents per hundred pounds. This is the only thing which Lee Way can use to compete with the rails in transporting carbon black.

Lee Way will lose virtually all of its carbon black unless [fol. 73] its rates are on a parity in cents per hundred pounds with the rail's. Such a loss would seriously effect Lee Way's financial position and ability to continue its present operations.

Dean McCoy.

Subscribed and sworn to before me by Dean McCoy, to certify which witness my hand and seal of office this 12 day of December, 1955.

Lee Binion, Notary Public, Dallas County, Texas.

My commission expires 6-1-57.

[fol. 74] IN UNITED STATES DISTRICT COURT

STATE OF TEXAS,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared Phil G. Abell, who, being by me duly sworn, states on oath as follows:

AFFIDAVIT

My name is Phil G. Abell. I reside at Dallas, Texas. I am Division Superintendent for Sunset Motor Lines, a motor common carrier engaged in the interstate transportation of property for hire, and a complainant in this proceeding. My company actively solicits the business of transporting the commodity known as "Carbon black", and does transport said commodity in substantial quantities. Examination of the records of Sunset Motor Lines shows that during the period September 27, 1955 through November 23, 1955, the company transported 1,361,910 pounds of carbon black

to Dallas, Texas where the traffic was delivered to other motor carriers for transportation to destination. My company received $7,185.68 in revenue for this service.

Sunset Motor Lines recently received a letter from a large rubber manufacturer, located in the State of Ohio, calling attention to the substantial carbon black rate advantage in favor of rail carriers resulting from the reduced rail rates originally scheduled to become effective on September 24, 1955. The letter further inquires as to what action my company intends to take with respect to adjustment of its carbon black rates to meet rail competition. [fol. 75] Sunset Motor Lines cannot continue to participate in the movement of carbon black traffic except at rates which are substantially competitive, in cents per hundred pounds, with those of the rail carriers. Carbon black traffic is extremely important to my company in view of the fact that the great preponderance of traffic moves in a westerly direction, and the eastbound transportation of carbon black enables it to partially balance its operation. Sunset Motor Lines formerly transported large quantities of Carbon Black to Houston, Texas. This traffic was destined for export from the United States. Since November 24, 1955, virtually all of this traffic has been lost to my company because of the reduced rail rates.

Phil G. Abell.

Subscribed and sworn to before me by Phil G. Abell, to certify which witness my hand and seal of office this 12 day of December, 1955.

Lee Binion, Notary Public, Dallas County, Texas.

My commission expires 6-1-57.

[fol. 76] In United States District Court

Affidavit

State of Texas,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally

appeared Neil G. Yows, who, being by me duly sworn, states on oath as follows:

My name is Neil G. Yows. I reside in Amarillo, Texas. I am President of Amarillo-Borger Express, Inc., a motor common carrier engaged in the interstate transportation of property for hire and a complainant in the proceeding. My company actively solicits the business of transporting the commodity known as "carbon black," and does transport said commodity in substantial volume. Examination of the records of Amarillo-Borger Express, Inc., discloses that during the period January 1, 1955, through September 30, 1955, the company transported 1,204 truck loads of carbon black, totaling approximately 34,916,000 pounds in weight. The total revenue for the transportation of the 1,204 truck loads was $513,961.67, of which $55,601.91 accrued to Amarillo-Borger Express, Inc. This carbon black revenue constituted 18.64 percent of the total gross revenue of my company during the period January 1, 1955, through September 30, 1955.

[fol. 77] I know from my experience in the transportation of carbon black traffic, and my relation with shippers and receivers thereof, that my company cannot continue to participate in the movement of this traffic at rates which are not substantially competitive, in cents per hundred pounds, with those of the rail carriers. The continued transportation of carbon black traffic is essential to the financial stability of Amarillo-Borger Express, Inc.

Neil G. Yows.

Subscribed and sworn to before me by Neil G. Yows, to certify which witness my hand and seal of office this 12th day of December, 1955.

Lee Binion, Notary Public, Dallas County, Texas.

My commission expires June 1, 1957.

[fol. 78] IN UNITED STATES DISTRICT COURT

BEST MOTOR FREIGHT, INC.
2511 Swiss Avenue
Dallas, Texas

AFFIDAVIT

My name is Vernon Crenshaw, General Traffic Manager for Best Motor Freight, Inc., 2511 Swiss Avenue, Dallas, Texas, which operates as a common motor carrier of general commodities in a six state area of Texas, Oklahoma, Missouri, Illinois, Indiana and Ohio by right and authority of Certificate of Public Convenience and Necessity No. MC-103370-Sub. 3.

Among those commodities which constitute a major portion of our Northbound tonnage is listed Carbon Black. My Company actively solicits the business of transporting Carbon Black, and transport this commodity in substantial volume. The continued transportation of the commodity is of extreme importance to the financial well being of Best Motor Freight, Inc. Examination of the records of Best Motor Freight, Inc. show that during the month of October we transported approximately 500,000 pounds of this commodity which produced for us revenue in the amount of $6,651.38. Our experience in the handling of this commodity and our dealings with the Shippers and Receivers thereof indicates conclusively that we cannot participate in the movement of the traffic at rates which are not substantially [fol. 79] competitive with those of the rail carriers in cents per hundred pounds.

Dated at Dallas, Texas this the 12th of December A.D. 1955.

Vernon Crenshaw.

THE STATE OF TEXAS,
County of Dallas

Before me, a Notary Public in and for the County of Dallas, State of Texas, personally appeared Vernon Crenshaw, a person well known to me, who having been duly sworn deposes and says that he prepared the foregoing

affidavit and that the contents thereof are true and correct of his own knowledge.

Given under my hand and seal this the 12th day of December A. D. 1955.

William Bonn, Notary Public, Dallas County, Texas.

My Commission Expires June 1, 1957.

[fol. 80] IN UNITED STATES DISTRICT COURT

AFFIDAVIT

STATE OF TEXAS,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared D. E. Sable, who, being by me duly sworn, states on oath as follows:

My name is D. E. Sable. I reside at Dallas, Texas. I am a Vice-President of Yellow Transit Freight Lines, Inc., a motor common carrier engaged in the interstate transportation of property for hire, and a complainant in this proceeding. My company actively solicits the business of transporting the commodity known as "carbon black", and does transport said commodity in substantial quantities. Examination of the company records shows that during the period January 1, 1955, through September 30, 1955, Yellow Transit Freight Lines, Inc. transported 14,741,226 pounds of carbon black, for which transportation it received $141,740.71 in revenue.

My company has recently received a letter from a large rubber manufacturer, located in the State of Ohio, calling attention to the substantial carbon black rate advantage in favor of the railroads resulting from the reduced rail rates originally scheduled to become effective September 24, 1955, and inquiring as to what action Yellow Transit Freight [fol. 81] Lines, Inc. intends to take with respect to adjustment of its rates to meet the railroad competition. Unless my company maintains carbon black rates which are sub-

stantially competitive in cents per hundred pounds, with those of the rail carriers it cannot participate in the movement of carbon black traffic. Carbon black traffic is extremely important to my company since it constitutes a large portion of the total tonnage originating in the Southwestern territory.

D. E. Sable.

Subscribed and sworn to before me by D. E. Sable, to certify which witness my hand and seal of office this 12th day of December, 1955.

Lee Binion, Notary Public, Dallas County, Texas.

My Commission expires June 1, 1957.

[fol. 82] IN UNITED STATES DISTRICT COURT

AFFIDAVIT

STATE OF TEXAS,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared D. C. Armstrong, who, being by me duly sworn, states on oath as follows:

My name is D. C. Armstrong. I reside at Abilene, Texas. I am Vice-President of Merchants Fast Motor Lines, a motor common carrier engaged in the interstate transportation of property for hire, and a complainant in this proceeding. My company actively solicits the business of transporting the commodity known as "carbon black" and does transport said commodity in substantial quantities. During the period January 1, 1955 through September 30, 1955, Merchants Fast Motor Lines transported 4,407,046 pounds of carbon black to Dallas and Lubbock, Texas, where it was delivered to other motor carriers for transportation to destination. For this service my company received $15,768.88 in revenue.

My company recently received a letter from a large rubber manufacturer domiciled in the state of Ohio calling

attention to the substantial carbon black rate advantage in favor of the railroads resulting from the reduced rail rates originally scheduled to become effective on September 24, [fol. 83] 1955. The letter inquired as to what action Merchants Fast Motor Lines intends to take with respect to adjustment of its carbon black rates to meet rail competition. My company cannot continue to participate in the movement of carbon black traffic except at rates which are substantially competitive, in cents per hundred pounds, with those of the railroads.

D. C. Armstrong.

Subscribed and sworn to before me by D. C. Armstrong to certify which witness my hand and seal of office this 12th day of December, 1955.

Lee Binion, Notary Public, Dallas County, Texas.

My Commission expires June 1, 1957.

[fol. 84] IN UNITED STATES DISTRICT COURT

AFFIDAVIT

STATE OF TEXAS,
County of Dallas

Before me, the undersigned authority, a Notary Public in and for Dallas County, Texas, on this day personally appeared Virgil T. Springer, who, being by me duly sworn, states on oath as follows:

My name is Virgil T. Springer. I reside in Dallas, Texas. I am General Traffic Manager of Strickland Transportation Co., Inc., a motor Common Carrier engaged in the interstate transportation of property for hire and a complainant in this proceeding. My company actively solicits the transportation of carbon black manufactured in the southwest and does transport this commodity. Examination of the records of Strickland Transportation Co., Inc., reveals that during the period January 1, 1955 through September 30, 1955 the company transported 25,201,290 pounds of carbon black.

The net revenue which accrued to Strickland Transportation Co., Inc., was $165,149.08 in transporting this carbon black.

I know from my personal experience in the transportation of carbon black and my relations with shippers and receivers that my company cannot continue to participate in the transportation of this traffic at rates which are not substantially competitive with those of the railroads in cents per one hundred pounds. My company is in receipt of a letter from one of the large tire manufacturers located in Ohio pointing out the rate advantage now enjoyed by rail lines and inquiring as to what action is contemplated regarding this condition.

[fol. 85] Virgil T. Springer.

Subscribed and sworn to before me by Virgil T. Springer, to certify which witness my hand and seal of office this 12th day of December, 1955.

Lee T. Binion, Notary Public, Dallas County, Texas.

My Commission expires June 1, 1957.

[fol. 86] In United States District Court

Amarillo-Borger Express, Inc., et al

vs.

United States of America

Civil Action No. 6289

Opinion of the Court—January 23, 1956

Before Brown, Circuit Judge, Atwell and Estes, District Judges.

Brown, Circuit Judge:

This is another skirmish in the running battle over freight rates for transportation of carbon black from the Southwestern area to the industrial area in the East. The precise question presented is whether the Interstate Com-

merce Commission's action in vacating a prior suspension of proposed rail rates was proper and, preliminary to that, whether such Commission act is reviewable at all.[1] We hold that it is, and that the action was improper.

Carbon black is an important product of natural gas. Consequently, the principal production is in that portion of United States known in the traffic world as the Southwestern area. With extensive natural gas activities, Texas is a leading producer. The principal consumers are the manufacturers of rubber goods, primarily automobile tires, one of the chief and typical consuming points being Akron, Ohio. Transportation of carbon black by Motor Carriers is important to them as it furnishes a substantial tonnage for movement from the Southwest to the Ohio area which would otherwise be a dead haul since the predominant long haul [fol. 87] Motor Carrier traffic moves *to* the Southwest. Until 1954, the rates were apparently competitive between rail and motor carriers.

The controversy, of which the present action is the latest part, originated in 1954. Translating the problem from abstract concepts into a typical illustration of the operation of the rates better demonstrates the significance of the actions taken and its vital importance in the economic existence of complainants. A typical illustration on which there is no dispute is the rate from points in the Texas Panhandle to Akron, Ohio. The pre-1954 rate for motor carrier was $1.53 per cwt; the rail rate was approximately $1.56 cwt. The slight difference, we are told, was in the operation of the blanket general increases.

In the early part of 1954, the rail carriers published certain schedules which established a substantial differential in their favor below motor carrier rates. The rail rate which had been $1.56 was reduced to $1.4785 cwt. The differential was then 5.15 cents below the motor carrier rate ($1.53). These schedules were permitted to become effective.

Thereafter, the motor carriers (which included the com-

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[1] The complaint filed by interested Motor Carriers is for review by statutory three-judge court, 28 U.S.C.A. 1336, 1398, 2284, 2321 to 2325.

plainants here) filed schedules which, they asserted, were designed to meet this new scale and restore the competitive parity which had formerly existed. However, upon the filing of these schedules, the competing rail carriers petitioned the Interstate Commerce Commission to suspend them, and this was done. The Commission ordered an investigation of these proposed motor carrier rates which it had suspended. This hearing was held in July 1954. The Trial Examiner, upon hearing and consideration, filed a report in which he recommended that the Commission find that the motor carriers' reduction in rates was justified and lawful. The rail carriers, as permitted under the practice of the Commission, filed Exceptions to the Report, and the matter is now pending undecided before the Commission. There is no indication before us concerning the reasons for this [fol. 88] delay or the time in which final decision is likely.[2] The seven months' statutory period, 49 U.S.C.A. 15(7), for suspension expired, but in accordance with the administrative practice followed generally, the period of suspension was extended until the matter was finally determined,[3] the

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[2] After decision by the appropriate Division, the rules permit a petition for rehearing and consideration before the full Commission, a procedure which, with further briefs, inevitably involves many months' time; and, upon completion of Commission review, interested parties can precipitate judicial review. If the past is any guide, it is improbable that a final decision would be achieved under a year.

[3] Apparently out of recognition of the physical impossibility of the Commission rendering a decision in these complex matters without adequate hearings, opportunity for preparation of constructive briefs, the submission and argument of interested parties and time for consideration and decision—a process which can seldom be done in seven months—it appears to be the universal practice of all regulated carriers concerned to agree to the continuation of a suspension once issued. On argument here, counsel for both rail and motor carriers assumed that this time-honored practice would be followed if, by our action, the prior suspension order was reinstated. Consequently, the matter goes way beyond April 23, 1956.

the effect of which is to freeze the motor carrier rates at their pre-1954 level ($1.53 cwt).

Notwithstanding the fact that the rail carriers through this situation were enjoying a 5.15 cents differential, they filed tariffs to become effective September 24, 1955, to establish a new schedule of rates substantially below their earlier reduced scale. For the typical movement, the proposed rate was $1.33 compared to the rail's 1954 rate of $1.4785, and the motor carriers' frozen rate of $1.53.

Through their authorized freight bureaus, the motor carriers, including Complainants, filed petitions with the Commission requesting the Commission to suspend the proposed schedules because they were unlawful, would result in rates and charges which would be unjust and unreasonable and [fol. 89] constitute unfair and destructive competition contrary to the National Transportation Policy. Replies were filed by interested parties, including the railroads. In a conference hearing September 21, 1955, the Suspension Board [4] declined to suspend. On September 23, 1955, Division 2, acting as an Appellate Division on suspension matters, issued its order suspending the proposed schedules and directing an investigation. The significant portion of this order [5] states:

> "*And it further appearing*, That upon consideration of the said schedules and protests thereto there is rea-

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[4] A board of Commission employees established for the purpose of handling suspension matters pursuant to 49 U.S.C.A. 17(2), § 7.3, 20 FR 5031-5035, July 14, 1955.

[5] Investigation and suspension docket No. 6476 Carbon Black—Southwest to U.S.A. & Canada

"*It appearing*, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective September 24, 1955, and later, designated as follows:"
[Railroad tariffs are described]

[then follows paragraph quoted in text above]

"*It is ordered*, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates,

son to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy; and good cause appearing therefor:"

Petitions for reconsideration by rail carriers and certain shippers were filed, and on November 14, 1955, Division 2 vacated[6] its prior order of suspension.

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charges and regulations contained in such schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

"*It is further ordered*, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including April 23, 1956, unless otherwise ordered by this Commission."

[6] "*It appearing*, That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956;

"*It further appearing*, That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:

"*It is ordered*, That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect."

[fol. 90] The only "finding" by the Commission [7] was:

> *"It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor:"

The result of these administrative proceedings is that motor carriers because of the railroads' successful petitions for suspension are bound by their pre-1954 rates, while the railroads compete for this traffic at drastically reduced rates during the many months ahead when the lawfulness of these rail rates is under review.[8]

[fol. 91] By motion and defense the Commission, the United States, and intervening railroads assert that the matter is beyond the power of review by this court because the granting or denial of a suspension is a matter committed wholly to the Interstate Commerce Commission; that complainants have failed to exhaust their administrative remedies and, in any case, even though the order vacating suspension was illegal,[9] both court and Commission are

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[7] By Order November 23, 1955, the full Commission denied the petition of motor carriers to waive their rule according administrative finality to suspension orders of Division 2, to stay the effectiveness of the order of November 14 and assign the whole matter for argument before the full Commission. The action under review, therefore, is that of the Commission, and not just a Division thereof.

[8] While the order of suspension September 23, 1955, was still effective, the Commission November 1, 1955, set the hearings on the investigation phase November 29, 1955, at Dallas. November 16, two days after the vacation of suspension, the Commission postponed indefinitely the hearings scheduled for November 29. The hearings are now scheduled to commence February 2, 1956.

[9] The suggestion was also made that complainants showed no irreparable injury entitling them to an injunction. Since, as competing carriers, they are clearly an aggrieved party entitled to complain of Commission action, Alton R. Co. v. United States, 315 U.S. 15, 86 L.Ed. 586; Chicago St. P. M.

powerless to suspend the rail schedules which have thus become effective or reinstate the prior rates.

[fol. 92] As the economic consequence of the Commission's action, if wrong, is so adverse we must be certain that the administrative processes which produce this result comply with the spirit and the rules of law.

In this approach, we do not, as the defendants fear we must, substitute ourselves for the Commission or pass judg-

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& O. Ry. Co. v. United States, (D.C.Minn.), 50 Fed.Supp. 249, affd. 322 U.S. 1, 88 L.Ed. 1093; cf. F.C.C. v. Sanders Brothers Radio Station, 309 U.S. 470, 84 L.Ed. 869; Interstate Com. Com. v. Oregon-Wash. R. Co., 288 U.S. 14, 25, 77 L.Ed. 588, 596; American President Lines v. Federal Maritime Board (D.C. D.C.), 112 Fed.Supp. 346, 349, it is our view that if, as we hold, the action is found to be "(1) not in accordance with law * * * (4) without observance of procedure required by law", § 1009(e), Administrative Procedure Act, 5 U.S.C.A. 1001 et seq, it is the duty of the court to set it aside and a complainant who qualifies as a statutory "aggrieved person" need not further show that he will suffer a specific dollar loss for unlawful action of a governmental agency. In any case, by suggestion of the Court on hearing and agreement of counsel, affidavits and counter-affidavits were filed in lieu of oral testimony upon which we find, as a fact, that the movement of carbon black from the Southwestern area to the Eastern part of the United States is an important, vital part of complainants' business, producing substantial revenues which, in all likelihood will be substantially reduced in view of the widespread differentials in favor of railroad transportation. Complainants had already received letters and similar inquiries from shippers and similar trade representatives inquiring what steps were to be taken to meet the rail competition after vacation of the suspension order. The rail's action in successfully obtaining suspension of the motor carriers' 1954 schedules manifests the carrier approach to the dominant significance of the differential in rates as the principal basis for traffic diversion. And, of course, by its order of September 23, the Commission found the probability of destructive competition.

ment, at this time, upon the intrinsic merits of the question of the lawfulness or unlawfulness of the rail tariffs or the ultimate granting or denial of a suspension. Ours is the important, but much narrower inquiry: under the circumstances presented here, was the action of the Commission in vacating the suspension lawful and proper?"[10]

Of course, at the bottom, is the fact that a suspension order was issued on a finding of dominant significance. The order stated in categorical terms that, upon the record then before the Suspension Board and Division 2, on appeal, there was, "reason to believe that they [rates] would, if permitted to become effective, result in rates and charges, [fol. 93] rules, regulations or practices which would be

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[10] The action we review is not the failure of the Commission to suspend, nor are we confronted with the question of reviewability, or extent thereof, of Commission action, taken with proper regard to substantive and procedural requirements, declining to suspend proposed rates, such as that involved in the cases pressed on us so heavily by defendants: Carlson v. United States, (S.D.N.Y.) (three-Judge), 107 Fed.Supp. 398; Algoma Coal & Coke Company et al. v. United States, (D.C.Va., 1935) (three-Judge), 11 Fed.Supp. 487; M. C. Kiser Co. v. Central of Georgia Railway (D.C. Ga.), 236 Fed. 573, affd. 5 Cir., 239 Fed. 718; Manhattan Transit Co., Inc. v. United States, (D.C.Mass.) (three-Judge), 24 Fed.Supp. 174; National Water Carriers Association v. United States, (S.D.N.Y.) (three-Judge), 126 Fed. Supp. 87; Merchants Truckmen's Bureau v. United States (S.D.N.Y.), 16 Fed. Supp. 998. In some, it must be recognized, language so sweeping is used that, if followed literally, would put suspension actions by the Commission beyond the pale, a concept wholly out of harmony with the moving spirit of the Administrative Procedure Act and the underlying force of Judge Hutcheson's opinion, Ferguson-Steere Motor Co. v. United States (N.D.Tex. 1954) (three-Judge), 126 Fed.Supp. 588, 591, that such orders, as other Commission action, are subject to judicial scrutiny to determine legality and whether administrative discretion was exercised at all, and if so, whether abused.

unjust and unreasonable in violation of the * * * act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy." These are plain, emphatic words of strong meaning. Of course, neither the United States nor the Commission can assert that such virile language must be disregarded as routine, stereotyped bureaucratic formulae for the Commission was under a dual [11] statutory obligation adequately to state its reasons for the suspension order. Since all reviewing courts are admonished, and we are here through

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[11] The first is in § 15(7) of the Interstate Commerce Act, 49 U.S.C.A. 15(7):

"Whenever there shall be filed with the commission any schedule stating a new * * *, fare, or charge, or any new * * *, or any new * * * regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, * * *, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, * * *, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a *statement in writing of its reasons* for such suspension, may from time to time *suspend* the operation of such schedule and defer the use of such rate, fare, * * *, but not for a longer period than seven months beyond the time when it would otherwise go into effect; * * * At any hearing involving a change in a rate, fare, * * *, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, * * * is just and reasonable, * * *." (Emphasis supplied)

The second is in the Administrative Procedure Act, § 8, 49 U.S.C.A. 1007:

"* * * All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, *as well as the reasons or basis thereof*, upon all the material issues of fact, law or discretion presented on the record; * * *." (Emphasis supplied)

specific citation in the briefs before us, to accord to Commission action a presumption of legality, United States v. Chemical Foundation, 272 U.S. 1, 14, 15; Baltimore and Ohio R. Co. v. United States, 298 U.S. 349, 358, 360; Federal Power Commission v. Hope National Gas Co., 320 U.S. [fol. 94] 591, 602, we think that all parties were entitled to take this for its face value as a deliberate, responsible, articulate finding that the proposed rates would produce these results which, contravening the National Transportation Policy, would be destructive of a sound system of national transport, Act September 18, 1940, c. 722, Title I, Section 1, 54 Stat. 899.

But these findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by the order of vacation, swept away without the slightest indication of the existence of facts, an adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart. The propriety of its action, on the external record, must be tested under the simple, brief phrase, "and good cause appearing therefor."[12]

If the cryptic phrase "good cause appearing" is a sufficient indication of action, it will be a self-generating bar to any review since, "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," S.E.C. v. Chenery Corp., 318 U.S. 80, 87 L.Ed. 626. It is precisely because the scope of judicial review is so narrowly limited, that administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system

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[12] The second and significant paragraph of the order read: "It further appearing, that consideration has been given to the petitions of the respondents [railroads and some shippers] requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor;" Obviously the fact that railroads requested vacation of the order would not be good ground; nor, as contended by Complainants, do we think that the Commission meant that.

and statutory requirements. A threshold decision by reviewing court therefore is whether there is a "lack of the [fol. 95] basic or essential findings required to support the Commission's order," State of Florida v. United States, 282 U.S. 194, 215, 75 L.Ed. 291; United States v. Baltimore & Ohio R. Co., 293 U.S. 454, 465, 79 L.Ed. 587; Alabama G.S.R.Co. v. United States, 340 U.S. 216, 224, 95 L.Ed. 225; Cantlay & Tanzola v. United States (S.D. Calif.) (three-Judge), 115 Fed. Supp. 72; North Carolina v. United States, 325 U.S. 507, 89 L.Ed. 1760; Atlanta and St. Andrews Bay Railway Co. v. United States, 104 Fed.Supp. 193; Pacific Island Tariff Bureau v. United States, 129 Fed. Supp. 472.

Moreover, this requirement has now been made explicit by the Administrative Procedure Act, 5 U.S.C.A. 1007(b), which requires a statement of findings and conclusions in their ultimate legal form "as well as the reasons or basis therefor." Conceding, as they must, that under Riss and Co., Inc. v. United States, 341 U.S. 907, 95 L.Ed. 1345, the Commission is subject to the Administrative Procedure Act, the United States and the Commission seek to escape its impact in suspension matters on the theory that, since suspension is a matter committed to the discretion of the Commission, it is specifically excepted under Section 1009:

> "§ 1009. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) * * * any person * * * adversely affected or aggrieved * * *, shall be entitled to judicial review thereof."

Starting with Board of Railroad Commissioners of North Dakota v. Great Northern Railway Co., 281 U.S. 412, which, describing the statutory background of present Section 15(7) concerning suspensions, states, "This power of suspension was entrusted to the Commission only", and relying heavily on *Carlsen, Algoma Coal, Kiser, Manhattan Transit Co.*, and others cited footnote 10, supra, holding that a refusal to suspend is not subject to review, defendants argue that this administrative judgment exempts the whole field from the requirements of the Administrative Procedure Act.

[fol. 96] A proper regard for the whole reach of the Administrative Procedure Act and its long legislative history will not support an argument which would automatically remove from its protection substantially every administrative agency to whom was entrusted judgment and discretion in its administrative decision. This language was used to assure that judicial review would not be contrived where it was plain that none was intended, and where the action under inquiry was one wholly within the right of the agency to grant or refuse, allow or deny, with no statutory or similar standard established upon which to base its action. But the exercise of discretion, the making of judgments, and the issuance of sanctions, 5 U.S.C.A. 1001(f), upon the basis of administrative expertise are precisely the matters which Congress in this important legislation intended should be under, not exempt from, the Administrative Procedure Act.[13]

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[13] The following references to legislative history are found (on pages indicated) in Senate Document No. 258, 79th Congress, Second Session, Administrative Procedure Act, Legislative History:

Report of the Committee on the Judiciary (Report No. 752) at page 212:

"Sec. 10 [now § 1009] Judicial Review—*Section 10 on judicial review does not apply in any situation so far as there are involved matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.*

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

"The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have

Consequently, we are of the clear opinion that whatever the ultimate scope of judicial review might be on a suspension matter, the Commission is obliged in all stages to respect the requirements, the letter and the spirit of the Administrative Procedure Act. Since both it and the general law concerning the sufficiency of Commission action require an adequate statement of the underlying reasons for the action, we think it evident that the order of vacation did not satisfy these requirements. This order vacating the prior one is a part of, and must be read with, it. All that it says is that "good cause appearing" the prior action is rescinded. If it is read as though it were meant to be a

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no statutory question to review. That situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administra-[fol. 97] tive powers. However, "wherever statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record."

Committee on the Judiciary, House of Representatives, (House Report No. 1980), page 275, 276:

"Section 10. * * * [heading same as Senate Committee Report]

"This section requires adequate, fair, effective, complete, and just determination of the rights of any person in properly invoked proceedings.

"* * * [Here follows first paragraph of Senate Committee Report quoted above] The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

"Matters of discretion are necessarily exempted from the section, since otherwise courts would in effect supersede agency functioning. But that does not mean that questions

repeal, a withdrawal, and rescission of the findings that the rates would (1) be unjust, (2) unreasonable, (3) in violation [fol. 99] of the Act, (4) constitute unfair destructive competition, and (5) contravene the National Transportation Policy, the record would yet be inadequate. We do not think the Commission can make serious findings of this nature and then, without more, announce that they no longer exist. The basic facts, the underlying reasons for that action, would require, as a minimum, some discussion of the factors leading the Commission intelligently and as a matter of deliberative judgment in good faith to contrary conclusions. If, as may be suggested by the order of November 14, the Commission felt that there was information contained

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of law properly presented are withdrawn from reviewing courts. Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record. In any case the existence of discretion does not prevent a person from bringing a review action but merely prevents him *pro tanto* from prevailing therein."

And in debates in the Senate (Congressional Record March 12, May 24, 25, 27, 1946) during presentation by its distinguished sponsor Senator McCarran, page 310, 311:

"Mr. McCarran: I yield.

"Mr. Donnell: I should like to ask the distinguished senator a question. Section 10 [now 5 U.S.C.A. 1009] of the bill recites in part that—

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

[fol. 98] "(a) Right of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of

in the petitions to vacate which justified or required the change in its conclusions, the Commission could easily have given sufficient elaboration of the file record to enable parties, counsel, and reviewing tribunals to determine whether this was the act of genuine judgment, deliberate discretion and reasonable decision, or whether it was hasty, ill considered, precipitous action with no substantial basis for it.

What we have said is certainly correct if it is assumed that the Commission intended its cryptic phrase "good cause appearing" to wipe away all of its prior fact conclusions. It is all the more so if, as seems likely, the Commission intended that the balance of its order of September 23

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any relevant statute, shall be entitled to judicial review thereof.

"It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

"Mr. McCarran: Mr. President, let me say, in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

* * * * * * *

"Mr. Donnell: But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

"Mr. McCarran: It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning."

calling for investigation of the rates to determine their lawfulness should remain in effect. In expressed terms the only change made by the subsequent order was to vacate the former so far as concerned suspension alone. It literally left in force the findings of unlawfulness, destructive competition, and then, without more than the magic phrase "good cause appearing", determined that what on September 23 led them to suspend now led them to unsuspend. The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the "reasons or basis therefor."

[fol. 100] We are equally of the clear opinion that Complainants have the right to challenge and the court has the power to nullify action so illegal and having such immediate and irreparable consequences. Unless the rates are suspended, the Complainants have no protection against this competition until such time as the Commission's decision has become final on the basic investigation or on a complaint under Section 13, 49 U.S.C.A. 13. But under the statutory scheme of Section 15(7), rates can be suspended only within thirty days and then not for a time beyond seven months. If, as we hold it was, the act of the Commission in vacating the prior suspension was illegal, the only possible way for Complainants to secure the benefit of that suspension or to eradicate the devastating consequences of an unlawful vacation of it, was by an immediate appeal and injunction. In this sense it was no routine, administrative interim action but was truly final in form and effect; once gone, it was irretrievable. There was thus no further administrative machinery or procedure available—much less to be exhausted. Utah Fuel Company v. National Bituminous Coal Commission, 306 U.S. 56; Isbrandtsen Co. v. United States, 211 F.2d 51; see also opinion of Mr. Justice Douglas, as Circuit Justice, standard v. Olsen, May 22, 1954, 98 L.Ed. 1151. If the Commission act is allowed to stand, the right to a suspension is forever gone until, months or years later, a decision of the Commission on basic unlawfulness or unreasonableness of the rates becomes final and effective. Complainants may succeed in the investigation proceeding soon to commence, but grinding, as it must, slowly through inevitable judicial review, the motor carriers

will have no relief for the traffic which they have lost, diverted to rails, during this long period of time.[14] We do not mean to say that Complainants are entitled to a suspension; but when one has validly issued it can be rescinded only by lawful methods.

[fol. 101] Nor can this situation which makes judicial relief from administrative error imperative be turned, as defendants attempt, into the argument that such relief should be denied because the Commission is now powerless to suspend rates once they are in effect. We can assume that by virtue of Sections 6(3), 15(1) and 15(7) of the Act, 49 U.S.C.A. 6(3), 15(1), 15(7), that suspension must be ordered within thirty days of the initial filing, and where once allowed to become effective from the absence of a suspension order, the Commission cannot thereafter suspend. Skinner and Eddy Corp. v. United States, 249 U.S. 557. But no such thing occurred here. Here, before the rates became effective, a valid suspension order was issued. On the record this suspension order was vacated, but, for the reasons we have detailed, this action was contrary to law. The power of the Commission to continue a suspension validly made (until validly set aside) cannot be altered by illegal action, nor can the carrier (here the rails) upon whose petition the illegal action was taken, assert that their rights to put into effect tariff rates shall be the same as though no such administrative action had taken place. Once the order of November 14 is expunged, the matter is remitted to the situation existing immediately prior to its entry: The rates were then under valid suspension. The power of the Commission does not exhaust itself through its own errors. If it were so, the law would indeed be a straight jacket.

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[14] The provision in § 15(7), footnote 11 supra, for protection of shippers after the expiration of the seven months' statutory period of suspension is of no help to competing carriers adversely affected since this relates only to "proposed *increased*" rates, and the requirement to keep accurate records and make refunds of excess payments received in the interim is limited to "the persons in whose behalf such amounts were paid."

It follows, therefore, that the order of November 14, 1955, vacating the suspension must be declared void, an injunction against its enforcement issued, and the proceedings [fol. 102] remanded to the Commission for further and not inconsistent proceedings as though the order had never been made. To effectuate the holding herein, the injunction will forbid the use or application of tariff [15] rates and schedules which became, or were allowed to become, effective by reason of the vacation of the prior suspension order of September 23, 1955, until such time as the order of September 23, 1955, shall have been rescinded or modified by lawful action of the Commission.

Judgment for plaintiff.

Remanded to the Commission.

JOHN R. BROWN,
Circuit Judge
WM. H. ATWELL,
District Judge
JOE E. ESTES,
District Judge

[fol. 103] IN UNITED STATES DISTRICT COURT

AMARILLO-BORGER EXPRESS, INC., ET AL

vs.

UNITED STATES OF AMERICA

Civil Action No. 6289

JUDGMENT—January 24, 1956

Be it remembered, that on December 12, 1955, in the above entitled and numbered cause wherein Amarillo-Bor-

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[15] Subsequent to November 14, 1955, the railroads filed Supplement 170, published as a new tariff schedule, effective December 31, 1955, but which is, they state, the equivalent of, and restores, the schedules suspended September 23.

ger Express, Inc.; Best Motor Freight; Knaus Truck Line, Inc.; Leeway Motor Freight, Inc.; Merchant's Fast Motor Lines, Inc.; Strickland Transportation Company, Inc.; Sunset Motor Lines, Inc.; and Yellow Transit Freight Lines, Inc., are Complainants; the United States of America is Defendant; and the Interstate Commerce Commission is intervenor on behalf of the Defendant; and the Southwestern Railroads (a group of Railroads whose names are listed in Appendix "A" of this judgment) are likewise intervenors on behalf of the Defendant, the trial upon its merits came on regularly to be heard before a Court of three judges convened pursuant to law. All parties appeared by counsel and the merits of the cause were fully presented, and the matter was submitted to the Court.

Thereafter, and on January 23, 1956, the Court delivered and filed its unanimous opinion to the effect that the assailed order is void and that the Complainants are entitled to injunctive relief as specified in the said opinion, to which opinion reference is here made.

It is, therefore, ordered, adjudged and decreed by [fol. 104] the Court that the order of the Interstate Commerce Commission entered on November 14, 1955, and reading as follows:

> "Order. At a Session of the Interstate Commerce Commission, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 14th day of November, A. D. 1955. Investigation and Suspension Docket No. 6476. Carbon Black—Southwest to U.S.A. & Canada. *It appearing,* That by an order dated September 23, 1955, the Commission, Division 2, acting as an appellate division, entered upon an investigation concerning the lawfulness of certain rates and charges and the regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including April 23, 1956; *It further appearing,* That consideration has been given to petitions of the respondents requesting vacation of the order of suspension, and to replies thereto, and good cause appearing therefor; *It is ordered,* That the said order of September 23, 1955, be, and the same is hereby,

vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that the proceeding of investigation of said schedules shall continue in full force and effect. By the Commission, Division 2, acting as an appellate division. Harold D. McCoy, Secretary. SEAL."

be, and the same is hereby, declared to be void, ab initio, said order is hereby set aside and its enforcement is hereby restrained and enjoined.

It is further ordered, adjudged and decreed by the Court that the suspension proceedings out of which the enjoined order arose be, and the same are hereby, remanded to the Interstate Commerce Commission for further and not inconsistent proceedings as though the order of November 14, 1955, had never been entered.

It is further ordered, adjudged and decreed by the Court that the use in interstate or foreign commerce of Supplement 170 to Southwestern Lines Freight Tariff No. 111-J, ICC No. 3744 (Agent F. C. Kratzmeir) and any and all other Railroad tariff rates and schedules which became or were allowed to become effective by reason of the order of November 14, 1955 (to the extent that they publish rates suspended by the order of Sept. 23, 1955), be and the same is hereby prohibited until such time as the order of September 23, 1955, issued by the Interstate Commerce Commission in its investigation and suspension Docket No. 6476 shall have been rescinded or modified by lawful action of the Interstate Commerce Commission.

[fol. 105] Rendered and entered in open Court this 24th day of January, 1956.

Wm. H. Atwell, United States District Judge

Approved for entry: Ralph W. Currie, Attorney for Complainants; John C. Ford, Attorney for United States of America; Bernard English, Attorney for Interstate Commerce Commission; Wm. R. McDowell, Attorney for Southwestern Railroads.

[fols. 106-107] Appendix A to Opinion (copy)

Omitted. Printed side page 30 ante.

[fol. 108] IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL BY SOUTHWESTERN RAILROADS

Come now, the Southwestern Railroads, Party-Defendants named in Appendix "A" attached to their answer filed herein, and file this their Motion, pursuant to Rules 52B and 59A, 28 U.S.C. Federal Rules, to open the Judgment herein and to grant a rehearing on the following grounds:

1.

The Court's opinion permits a review of a temporary rate suspension order made by the Interstate Commerce Commission. Southwestern Railroads respectfully contend that in doing so the Court has failed to give effect to Section 10 of the Administrative Procedure Act (5 U.S.C., Section 1009), which denies review of agency action when such action is committed to agency discretion. Clearly the intent of Section 15, Subsection (7) of the Interstate Commerce Act is to allow the agency a six months' discretionary period in which the agency can decide the reasonableness of a rate and during which the agency can provide for either the applicability or non-applicability of the new rate. This statute gives the agency, the expert body in this field, an opportunity to have a hearing and to apply its special knowledge in the field, but the Court, in allowing such a premature review of agency action, denies the agency the [fol. 109] statutory-given discretion. The Southwestern Railroads contend that the Court should review its findings in this respect and allow further hearing on this point.

2.

Because of the Court's Judgment in this matter, the Southwestern Railroads are now forced to charge a higher rate than that provided for in the tariff here under attack, and in view of the Court's finding that the Commission's Order of November 14, 1955 is void ab initio, the carriers are placed in the position of being forced to collect from the shippers or receivers undercharges represented by the dif-

ferences between the lower rates charged under the new tariff and the higher rates which would have been applicable had the tariff not been filed. The question of the correctness of intervening charges was not argued nor placed in issue before the Court and is a matter about which the shippers, receivers, and the Southwestern Railroads are greatly concerned because of the financial impact it will have upon them and because of the great amount of clerical work which will be forced upon them in computing the correct charges due from shippers and receivers and the sales prices based thereon. Because of the importance of this phase of the Court's Judgment, the Southwestern Railroads respectfully request that rehearing be granted on the correctness of this phase of the case.

3.

The Court's decision is based upon the premise that the Order of the Commission dated November 14, 1955 was improperly issued because of the failure to include in such order those findings and conclusions provided for in 5 U.S.C., Section 1007. Southwestern Railroads respectfully contend that such a premise is erroneous in that such findings and conclusions are only required in reviewable orders [fol. 110] of final effect and should not be made applicable to matters of temporary effect entrusted solely to the agency's discretion as in the instance of temporary suspensions made under 49 U.S.C. Section 15 (7).

Southwestern Railroads respectfully request that should this Motion be granted, that the Court's Judgment of January 24, 1956 be stayed pending rehearing; and it is also requested that the carrier-defendants have an additional fifteen days for the filing of brief amplifying the grounds for new trial set forth above.

Wherefore, premises considered Southwestern Railroads respectfully pray that the Judgment entered herein on January 24, 1956 be opened and that a rehearing thereof be granted, that the Court's Judgment be stayed pending rehearing, and for such other and further relief to which the

Southwestern Railroads may be entitled either in law or in equity.

William R. McDowell, Attorney for Southwestern Railroads, Texas and Pacific Building, 1025 Elm Street, Dallas, Texas.

Certification of Service (omitted in printing)

[fol. 111] In United States District Court

Motion for New Trial by the United States of America and the I.C.C.

Now comes the United States of America and the Interstate Commerce Commission, defendants in the above styled action, and moves the Court pursuant to Rule 52(b) and Rule 69(a), 28 U.S.C., Federal Rules of Civil Procedure, to open the judgment herein and to grant re-hearing on the following grounds:

1.

The Court's opinion rests on the premise that Section 8(b) of the Administrative Procedure Act requires the Commission to make findings when it vacated its order of September 23, 1955. Section 8(b), on its face, has no application here. The section, as the Supreme Court has recently recognized, applies only "In cases in which a hearing is required to be conducted in conformity with Section 7—." [fol. 112] See American Trucking Association v. United States, 344 U.S. 298, 319-320. No hearing whatsoever is required in suspension proceedings—let alone the type of hearing that must be conducted in conformity with Section 7. On this ground alone, reconsideration is warranted.

2.

A substantial question is also presented by the Court's apparent holding that Commission orders granting or denying suspension are made reviewable by Section 10 of the

Administrative Procedure Act. This section, by its own terms, does not apply where "agency action is by law committed to agency discretion—." The importance of this question in the administration of the Interstate Commerce Act can be gauged by the fact that over four thousand requests for suspension relief were acted upon during the year ending November 1, 1955. 69th Annual Report, Pages 101-102. If the Court's decision is correct, the disposition of each of these requests would be subject to review. The far reaching and novel nature of the decision presents an additional reason for granting re-argument. This is particularly so in view of the fact that it has been accepted universally since 1910 that rates which have become effective are not subject to suspension by the Commission or by the courts.

3.

The Court's judgment, entered January 24, 1956, sets aside the Commission's order of November 14, 1955, as "*void ab initio.*" The result of this judgment is that for [fol. 113] over nine weeks the intervening railroads have been collecting freight charges below the legal rate and that these railroads are now obligated to collect from its shippers for undercharges—that is, the difference between the charges actually paid and the higher rate previously enforced. Since the effect of the Court's decision on these shippers was not briefed or argued and was not considered in the Court's opinion, this matter should likewise be examined on re-argument.

4.

Each of the above questions was either completely ignored or, at best, received scant mention in the original memoranda filed in this action. One reason for this, it is felt, is the inadequate time—approximately two weeks—available to counsel between the filing of the action and the final hearing ordered by the Court. As a consequence, only a few days were available for the actual task of briefing, and there was no opportunity to see the plaintiffs' brief prior to submitting the defendants' briefs. Only through re-argument can these important questions receive the serious consideration they merit.

Should the Court grant this motion, it is also requested that the Court's judgment of January 24, 1956, be stayed pending decision on the re-argument.

In view of the limited time defendants have had to prepare this motion, it is requested that an additional fifteen [fol. 114] days be allowed for the filing of briefs amplifying the grounds for new trial set forth above.

(s) Stanley N. Barnes, Assistant Attorney General; (s) Heard L. Floore, United States Attorney; (s) John C. Ford, Assistant United States Attorney; (s) James E. Kilday, (s) Albert Parker, (s) Earl E. Parker, Attorneys, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

(s) Robert W. Ginnane, General Counsel, Interstate Commerce Commission; (s) Bernard H. English, Attorney, Interstate Commerce Commission, Fort Worth, Texas; (s) H. Neil Carson, Attorney, Interstate Commerce Commission, Washington 25, D. C., Attorneys for Interstate Commerce Commission.

[fol. 115] Certificate of Service (omitted in printing)

[fol. 116] In United States District Court

Order Overruling Motions for New Trial—February 21, 1956

On this the 20th day of February, 1956, came on for consideration by Court of three judges, to-wit, John R. Brown, Circuit Judge, William H. Atwell and Joe E. Estes, District Judges, the motions of the defendant and intervenors on behalf of the defendant for new trial.

Consideration having been given to said motions and to the arguments and the briefs for and against the same, and it appearing to the Court that said motions are without merit;

It is, therefore, ordered that the motions for new trial be and they are hereby severally overruled.

Rendered and entered in open court this 21st day of February, 1956.

John R. Brown, United States Circuit Judge, Wm. H. Atwell, United States District Judge, Joe E. Estes, United States District Judge.

Approved as to Form: Ralph W. Currie, Attorney for Complainants; John C. Ford, Attorney for United States of America; Bernard English, Attorney for Interstate Commerce Commission; Wm. R. McDowell, Attorney for Southwestern Railroads.

[fol. 116a] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY SOUTHWESTERN RAILROADS TO THE SUPREME COURT OF THE UNITED STATES—
Filed March 15, 1956

I. Notice is hereby given that the Southwestern Railroads, as listed in Appendix A hereto attached, Defendants herein, hereby appeal to the Supreme Court of the United States from the final decree and judgment, entered in this action on January 24, 1956.

This appeal is taken pursuant to 28 U.S.C., Sections 1253 and 2101 (b).

II. The Clerk will please prepare a transcript of the record in this Cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Original Complaint.
2. Motion to Dismiss Filed by United States of America.
3. Motion for Leave to Intervene of Southwestern Railroads.
4. Order Granting Southwestern Railroads Leave to Intervene.
5. Motion to Dismiss and Answer Filed by Southwestern Railroads.

6. Motion for Leave to Intervene of Interstate Commerce Commission.

7. Order Granting Interstate Commerce Commission Leave to Intervene.

8. Motion to Dismiss Filed by Interstate Commerce Commission.

9. Affidavits of Lee Cisneros, Harry L. Brand, J. D. Spruill, R. J. Barlow, W. C. T. Utley, Arthur B. Strunk, Dean McCoy, Phil G. Abell, Neil C. Yows, Vernon Crenshaw, D. E. Sable, D. C. Armstrong, and Virgil T. Springer.

10. Opinion of District Court.

11. Judgment of District Court.

[fols. 116b-116c] 12. Notice of appeal to the Supreme Court of the United States.

III. The following questions are presented by this appeal:

1. Is an Interstate Commerce Commission's order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates, subject to judicial review under the provisions of Section 10 of the Administrative Procedure Act (5 U.S.C., 1009)?

2. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates?

3. Is the Interstate Commerce Commission required to make findings pursuant to Section 8(b) of the Administrative Procedure Act to support an order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of rates?

4. Is the Court empowered to set aside interstate rates already in effect, prior to a final Interstate Commerce Commission decision on their lawfulness?

5. Is the Court empowered to reestablish interstate rates which have been lawfully canceled?

J. T. Suggs, Counsel for Southwestern Railroads, Defendants-Appellants, 914 Texas and Pacific Building, Dallas 2, Texas.

Of Counsel: William R. McDowell

PROOF OF SERVICE (omitted in printing)

[fol. 116d] APPENDIX A TO NOTICE (COPY) Omitted. Printed side page 30 ante.

[fol. 117] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL BY THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—
Filed April 19, 1956

I.

Notice is hereby given that the United States of America and the Interstate Commerce Commission, defendants in the above-entitled civil action, hereby appeal to the Supreme Court of the United States from the final decree and judgment entered on January 24, 1956, and from the order entered on February 21, 1956, overruling a motion for a new trial.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II.

The Clerk is requested that there be included in the transcript of record for transmission to the Clerk of the Supreme Court, in addition to the matters listed by the Southwestern Railroads and the plaintiffs Amarillo-Borger Express, Inc., et al., the motion for new trial filed by the United States of America and the Interstate Commerce Commission and the motion to dismiss filed by the United States of America.

[fol. 118] III.

The following questions are presented by this appeal:

1. Is an Interstate Commerce Commission order, issued pending a hearing and final decision on the lawfulness of proposed rate schedules and vacating a previously ordered suspension of such schedules, subject to judicial review?

2. Is the Interstate Commerce Commission required to make findings to support such an order?

3. Whether the District Court erred in setting aside interstate rates already in effect prior to a final Interstate Commerce Commission decision on their lawfulness?

4. Whether the District Court erred in establishing interstate rate schedules which would have expired by their own terms?

Robert W. Ginnane, General Counsel; H. Neil Garson, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for Interstate Commerce Commission; Earl E. Pollock, Attorney, Department of Justice, Washington 25, D. C., Attorney for United States of America.

[fols. 119-121] Certificate of Service (omitted in printing)

[fol. 122] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 123] SUPREME COURT OF THE UNITED STATES—
October Term, 1956

No. 125 and 224

ARKANSAS & LOUISIANA MISSOURI RAILWAY COMPANY; THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; GULF, COLORADO AND SANTA FE RAILWAY COMPANY; ET AL.,
Appellants,

vs.

AMARILLO-BORGER EXPRESS, INC., ET AL.; AND UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

AMARILLO-BORGER EXPRESS, INC., ET AL.

ORDER NOTING PROBABLE JURISDICTION—October 8, 1956

Appeals from the United States District Court for the Northern District of Texas.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours allowed for oral argument.

54/2

Supreme Court, U. S.
FILED
MAY 31 1956
HAROLD B. WILLEY, Clerk

No. 889 125

In the

Supreme Court of the United States

Civil No. 6289

In the United States District Court for the Northern Division of Texas, Dallas Division

AMARILLO-BORGER EXPRESS, INC., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

STATEMENT AS TO JURISDICTION

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In the

Supreme Court of the United States

Civil No. 6289

In the United States District Court for the Northern Division of Texas, Dallas Division

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AMARILLO-BORGER EXPRESS, INC., *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

STATEMENT AS TO JURISDICTION

In compliance with paragraph 2 of Rule 13 of the Rules of the Supreme Court of the United States, the Southwestern Railroads, as shown in Appendix A hereto annexed, defendants-appellants, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause.

OPINION BELOW

The opinion of the District Court for the Northern District of Texas, Dallas Division, is reported in 138 F. Supp. 411. A copy of the opinion and the judgment are attached hereto as Appendix B.

JURISDICTION

Eight motor carriers[1] brought this action in a three-judge district court under Title 28, United States Code, Sections 1332, 1398, 2284, and 2321-2325, to enjoin and set aside an interlocutory order of the Interstate Commerce Commission vacating a previous interlocutory order of the Commission suspending, under Section 15(7) of the Interstate Commerce Act,[2] the operation of certain rail rates on carbon black from the Southwest to destinations in the United States and Canada.

The judgment of the district court was rendered and entered on January 24, 1956. Defendants' motions for new trial were severally overruled by order of the court on February 21, 1956. Notice of appeal was filed with the district court on March 14, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct

[1] Amarillo-Borger Express, Inc., Best Motor Freight, Knaus Truck Lines, Inc., Leeway Motor Freight, Inc., Merchant's Fast Motor Lines, Inc., Strickland Transportation Company, Inc., Sunset Motor Lines, Inc., Yellow Transit Freight Lines, Inc., Plaintiffs.

[2] Appendix C.

appeal in this case: *United States v. Capital Transit Company, 325 U. S. 357; United States v. Detroit and Cleveland Navigation Company, 326 U. S. 236; United States v. Pierce Auto Freight Lines, 327 U. S. 515; Radio Corp. of America v. United States, 341 U. S. 412.*

QUESTIONS PRESENTED

1. Is an Interstate Commerce Commission's order issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates, subject to judicial review?

2. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates?

3. Can a district court set aside interstate rates already in effect prior to a final Interstate Commerce Commission decision on their lawfulness?

4. Can a district court reestablish interstate rates which have been lawfully canceled?

STATUTES INVOLVED

Section 15(7) of the Interstate Commerce Act, as amended [49 U. S. C. 15(7)], and Sections 8 and 10 of the Administrative Procedure Act (5 U. S. C. 1007 and 1009) are set forth in Appendix C hereto.

STATEMENT OF THE CASE

This is an action brought to set aside an order of the Interstate Commerce Commission, Division 2, acting as an appellate division, entered November 14, 1955, in the proceeding entitled *Carbon Black—Southwest to U. S. A. and Canada, Investigation and Suspension Docket No. 6476.*

The proceeding before the Commission was instituted by the filing of proposed schedules of reduced rates and charges on carbon black by southwestern and western trunk line rail carriers to become effective September 24, 1955. Protests and petitions for suspension of the proposed rates were filed by five motor carrier rate bureaus, and replies thereto were filed by the rail carriers involved. On September 22, 1955, the Suspension Board of the Commission denied the petitions for suspension but voted to investigate the lawfulness of the proposed rates.

On the following day, September 23, 1955, Division 2, acting as an appellate division, entered an order suspending the operation of the proposed rates and directing a full investigation into the lawfulness of the schedules. Thereafter, petitions for reconsideration were filed by the National Gas Products Association and the rail carriers, and replies thereto were filed by the protesting motor carrier rate bureaus. On November 14, 1955, Division 2 entered an order stating in pertinent part "That the said order of September 23, 1955, be, and the same is hereby, vacated and set aside as of November 24, 1955, insofar as it suspended the operation of the schedules designated therein, but that

the proceeding of investigation of said schedules shall continue in full force and effect." A stay of this order was denied by the full Commission on November 23, 1955.

On the same day, November 23, 1955, eight motor carriers brought this action in the United States District Court for the Northern District of Texas, Dallas Division, under Title 28, United States Code, sections 1332, 1398, 2284, and 2321-2325, to review the November 14, 1955, order of the Commission. A request for a temporary restraining order was denied. Trial was on the merits and the district court, on January 23, 1956, rendered its opinion setting aside the order of the Commission entered on November 14, 1955, and remanded the cause to the Commission for further proceedings not inconsistent with its decision. The Court held that the Commission's order of November 14, 1955, was subject to judicial review under the provisions of Section 10 of the Administrative Procedure Act. The Court ruled that the Commission was required to make findings to support its order of November 14, 1955, and that, since the Commission had not done so, the order of November 14, 1955, was illegal and void. On January 24, 1956, the Court entered its judgment voiding *ab initio* the November 14, 1955, order of the Commission and enjoining the southwestern rail carriers from using the assailed tariffs which had become effective November 24, 1955. Motions for new trial were overruled by order of the Court on February 21, 1956.

THE QUESTIONS ARE SUBSTANTIAL

The decision of the District Court strikes down administrative procedure of the Interstate Commerce Commission of more than forty years' standing, and, if not reversed, constitutes an unwarranted and burdensome intrusion in the realm of orderly administration of interstate rates and charges under the Interstate Commerce Act. It holds that an interlocutory order of the Commission, issued pending a hearing and final decision on the lawfulness of rates under Section 15(7) of the Interstate Commerce Act, is subject to judicial review and illegal and void if not supported by findings. It reaches that result in disregard of legal principles hitherto generally accepted and on misconception of the provisions of the Administrative Procedure Act. The decision below is in conflict with the rulings of every court that has dealt with the issue and fails moreover to give proper effect to the decisions of this court governing the scope of the Administrative Procedure Act.

1. In 1910, Congress, in the Mann-Elkins amendment of the Interstate Commerce Act, first authorized the Commission, on the filing of rates by interstate rail carriers, to suspend the operation of the rates for a stated period. This authority is presently embodied in Section 15(7) of the Interstate Commerce Act [49 U. S. C. 15(7)]. Insofar as pertinent here, Section 15(7) provides that the Commission, pending a hearing and decision on the lawfulness of a new rate schedule filed with it "may from time to time suspend the operation of such schedule and defer the use of

such rate * * *, but not for a longer period than seven months beyond the time when it would otherwise go into effect * * *." Congress thus sought to protect a carrier's traditional right to initiate its own rates while at the same time protecting the rights of the public against prima facie unreasonable changes in the rate structure pending a final determination. The task of reconciling these sometimes conflicting interests in a particular case was committed wholly to the Commission's discretion. *Board of Commissioners v. Great Northern R. Co., 281 U. S. 412, 429.*

Since enactment of the Mann-Elkins Amendment, Commission decisions relating to the granting or denying suspension under Section 15(7) and comparable provisions of the Act have been held nonreviewable by every court that has dealt with the issue. *M. C. Kiser & Co. v. Central of Georgia Ry. Co., 236 Fed. 573 (S. D. Ga. 1916), affirmed 239 Fed. 718 (C. A. 5 1917); Algoma Coal & Coke Co. v. United States, 11 F. Supp. 487, 495 (D. Va. 1935) (three-judge court); Merchant Truckmen's Bureau v. United States, 16 F. Supp. 998, 1000 (S. D. N. Y. 1936); Manhattan Transit Co. v. United States, 24 F. Supp. 174, 177 (D. Mass. 1938) (three-judge court); Carlson v. United States, 107 F. Supp. 398 (S. D. N. Y. 1952) (three-judge court); National Water Carriers Ass'n v. United States, 126 F. Supp. 87, 90-91 (S. D. N. Y. 1954) (three-judge court).*

Despite these precedents the opinion of the District Court holds that the order of the Commission in this instance is

subject to review under the provisions of Section 10 of the Administrative Procedure Act (5 U. S. C. 1009).

But the Administrative Procedure Act, by its own terms and its legislative history, has not conferred upon the Court any additional reviewing powers which it did not have in the past. The Court in *Olin Industries, Inc. v. National Labor Relations Board, 72 Fed. Supp. 225*, made this abundantly clear when it stated at page 228:

> "Both the terms of this section, and its legislative history, make it clear that Section 10 is merely declaratory of the existing law of judicial review and that it neither confers jurisdiction on this court above and beyond that which it already has, nor grants to aggrieved parties any rights they did not have under the National Labor Relations Act."

To the same effect is the unanimous opinion of the three-judge court in *Atchison, Topeka & Santa Fe Railway Co. v. United States, 130 F. Supp. 76*, at page 78:

> "Plaintiffs also refer to Section 10 of the Administrative Procedure Act, 5 U. S. C. A., Sec. 1009, but it is clear that that Act merely was a declaration of existing law where judicial review is provided."

It is equally clear that existing law declares that the granting or denial of suspension of a proposed rate is discretionary with the Commission and its refusal to suspend a rate is not judicially reviewable.

Moreover the first sentence of Section 10 states two basic exceptions to the coverage of this section:

> "Except so far as (1) statutes preclude judicial review or (2) *agency action is by law committed to agency discretion.*" (Emphasis supplied.)

The legislative history regarding this exception points out that—

> "*Matters of discretion are necessarily exempt from the section, since otherwise courts would in effect supersede agency functioning.* But that does not mean that questions of law properly presented are withdrawn from reviewing courts. *Where laws are so broadly drawn that agencies have large discretion, the situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers.* * * *." (Emphasis supplied.) (House Committee Rep. 1946, p. 41; S. Doc. 248 79th Cong., p. 275.)

Congress clearly intended that the suspension procedure should be flexible and wholly within the sound discretion of the Commission. *M. C. Kiser & Co. v. Central of Georgia Ry. Co., 236 Fed. 573, 577 (S. D. Ga., 1916), affirmed, 239 Fed. 718 (C. A. 5, 1917)*, and cited with approval in *Skinner & Eddy Corp. v. United States, 249 U. S. 557, 565.* An order relating to suspension is but a preliminary step in an administrative proceeding, *Ewing v. Mytinger & Casselberry, 339 U. S. 594, 598*, and in no conceivable way can it be considered a final determination of the reasonableness of rates and practices. The Commission's decision necessarily depends on the Commission's expertness in the field rather than the scant record before it.

There were almost 5,000 suspension requests filed against over 4,000 rate adjustments disposed of by the Commission during the period November 1, 1954, to November 1, 1955. *69th Annual Report of the Commission,*

pages 101-102. If the District Court's unprecedented action is permitted to stand, then the Commission's action in each instance, granting or denying the suspension request, would be subject to review. The inevitable result, aside from an intolerable burden of litigation, would be an unwarranted and burdensome encroachment in the field of carrier administration committed by law to the Interstate Commerce Commission.

2. The decision below voided *ab initio* an interim order of the Commission upon the ground that the Commission failed to support its order with findings as required by Section 8 of the Administrative Procedure Act. Section 8 of the Administrative Procedure Act, by its express terms, has no application to the granting or denial of suspension by the Commission.

At the outset Section 8 states:

> "In cases in which a *hearing* is required to be conducted in conformity with Section 7 * * *." (Emphasis supplied.)

This language necessarily qualifies the balance of Section 8, including the provisions of 8(b) relating to findings upon which the Court relied in voiding the order here. Therefore, unless "a hearing * * * conducted in conformity with Section 7" is a prerequisite to Commission action granting or denying suspension, the Commission is not required by Section 8(b) to support its order of November 14, 1955, by findings.

The Senate Report of 1945 on the Administrative Procedure Act clearly indicated the thinking of Congress when it considered the enactment of Section 8. It said:

> "Like section 7, upon which section 8 depends, this section is supplementary to sections 4 and 5 in cases in which *agency action is required to be taken after hearing provided by statute* and not otherwise excepted from the operation of sections 4 or 5. (Senate Committee Report, 1945, p. 23; S. Doc. 248, 79th Congress, p. 209.)
>
> "Sections 4 and 5 prescribe the basic requirements for the making of rules and the adjudication of particular cases. *In each case, where other statutes require opportunity for an agency hearing, sections 7 and 8 set forth the minimum requirements for such hearings* and the agency decisions thereafter, while section 11 provides for the appointment and tenure of examiners who may participate." (Emphasis supplied.)

In considering the applicability of the Administrative Procedure Act to the instant proceeding, resort must be made to other relevant provisions of the Act. This proceeding involves the making of rates which the courts have universally recognized as a legislative function. *Peik v. Chicago N. W. R. Co., 94 U. S. 164; Reagan v. Farmers' Loan & T. Co., 154 U. S. 362; Simpson v. Shepard (Minnesota Rate Cases), 230 U. S. 352; Louisville & N. R. Co. v. Garrett, 231 U. S. 298; Loomis v. Lehigh Valley R. Co., 240 U. S. 43; Terminal R. Asso. v. U. S., 266 U. S. 17; Atchison, T. & S. F. Ry. Co. v. U. S., 232 U. S. 199, 221; cf. F. C. C. v. Pottsville Broadcasting Co., 309 U. S. 134,*

144. The provisions of Section 2 of the Administrative Procedure Act, 5 U. S. C. 1001, sets forth the definitions of the terms used in that act. Section 2(c), referring to rules and rule making, states in part:

> "Rule means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and *includes the approval or prescription for the future of rates,* * * *." (Emphasis supplied.)

The drafters of the Administrative Procedure Act, cognizant of the separation of functions of our type of government, properly placed rate making as performed by an administrative agency within the scope of those provisions of the Administrative Procedure Act referring to rules and rule making. Section 4 of the Act, 5 U. S. C. 1003, establishes the procedure to be followed by an administrative agency in rule-making functions. Section 4(b) specifically limits the application of Sections 7 and 8 to cases "Where rules are required by statute to be made on the record after opportunity for an agency hearing * * *." And the legislative history upon this portion of the Act emphatically indicates that Congress did not intend to make rate-making procedures of the type challenged here subject to the requirements of the provisions of Sections 7 and 8. The Senate Judiciary Committee Print of June, 1945 (reprinted in Administrative Procedure Act—Legislative History, Sen-

ate Document No. 248, 79th Cong., 2d Sess., at pages 19 and 20), states:

> "This subjection, which provides for public rule making procedures, applies only to the type of rules for which notice is required by subsection (a) above —that is, substantive rules, which involve true administrative legislation. As to that type of rules, moreover, it leaves agencies free to choose from the several common types of informal public rule making procedures, the simplest of which is to permit interested persons to submit written views or data, except where Congress has required that rules be issued only upon a hearing. In the latter case, the hearing and decision procedures of sections 7 and 8 necessarily apply. Thus, the provision does not extend present requirements except to require agencies, in the issuance of substantive rules, to permit at least the submission of written views or suggestions.
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> * * * * *
>
> "It should be noted that no requirement of formal administrative hearing is imposed except where Congress has by some other statute required that rules be issued upon hearing."

In *American Trucking Ass'ns v. United States, 344 U.S. 298*, this Court, at pages 319-320, stated:

> "* * * For Sec. 7 of the Administrative Procedure Act is limited by its own terms to 'hearings which section 4 or 5 requires to be conducted pursuant to this section.' Turning to those sections, it is found that they invoke Sec. 7 only when specified by statute: 'Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.' In short, Sec. 7 applies only when hearings were required by the statute under which they were conducted to be

made on the record and with opportunity for oral hearing."

This court then went on to say at page 320:

> "Similar reasoning supports our conclusion that Sec. 8(b) of the Administrative Procedure Act, which requires that decisions shall 'include a statement of (1) findings and conclusions,' invoked by appellants in No. 26, is likewise inapplicable. *For it, in turn, is limited to a 'hearing * * * required to be conducted in conformity with section 7'.*" (Emphasis supplied.)

In *Air Line Pilots Ass'n, Internat'l v. Civil Aeronautics Bd.*, *215 Fed. 2d 122*, Justice Harlan, then sitting on the United States Court of Appeals for the Second Circuit, pointed out at page 124:

> "It is also claimed that the procedure followed by the Board failed to meet the requirements of the Administrative Procedure and Civil Aeronautics Acts. I think this is not so. The Special Air Regulation involved here is easily within the definiton of a 'rule' as contained in Sec. 2 of the Administrative Procedure Act, 5 U. S. C. A., Sec. 1001(c). And the procedure pursued by the Board conforms to the 'rule-making' requirements of Sec. 4 of that Act, 5 U. S. C. A., Sec. 1003. Petitioners had actual notice of proposed rule-making and were afforded an opportunity, of which they availed themselves, to participate in the proceedings through submission of written data, views, and oral argument.
>
> "The fact that the Board did not proceed by way of the more formal route provided in Sections 7, 8 of the Administrative Procedure Act, 5 U. S. C. A., Sections 1006, 1007, is of no moment in this proceeding, since such procedure is required only where 'rules are required by statute to be made on the record after op-

> portunity for an agency hearing.' Section 4, A. P. A., 5 U. S. C. A., Section 1003(b); see American Trucking Ass'ns v. United States, 1953, 344 U. S. 298, 319-320, 73 S. Ct. 307, 97 L. Ed. 337. No such requirement is to be found in the Civil Aeronautics Act. Even if the Board had acted via its pending general rule-making proceedings, the petitioners would have been entitled to no more formal hearing than they received in this instance."

See also *Eastern Air Lines v. Civil Aeronautics Bd., 185 Fed. 2d 426, 427-428; Cook-Cleland Catalina Airways v. Civil Aeronautics Bd., 195 F. 2d 206, 207 (1952); Kenny v. United States, 103 F. Supp. 971*, and *George A. Rheman Company v. United States, 133 F. Supp. 668, 673.*

Section 15(7) of the *Interstate Commerce Act, 49 U. S. C. 15(7)*, provides in part:

> "* * * the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby *a statement in writing of its reasons for such suspension*, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, * * *." (Emphasis supplied.)

Nowhere in the provisions of Section 15(7) has Congress indicated in any manner that before the Commission suspends rates a hearing is required and the same is equally true with respect to the refusal to suspend rates. Section 15(7) does admonish the Commission to provide "a statement in writing of its reasons" for suspension to the carrier whose rates are suspended, but the Act is devoid of any insinuation that reasons must be given for refusal to suspend or where it vacates a prior suspension order. It follows

that Section 8(b) of the Administrative Procedure Act, which states in part—

> "* * * All decisions * * * shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; * * *."

has no application whatsoever to the action taken by the Commission in this case.

3. The opinion below establishes the further erroneous precedent of invalidating rates which were in effect for over two months and requiring observance of rates which were lawfully canceled.

On November 24, 1955, the reduced rates in issue went into effect and were in effect until voided by the lower court. In their complaint (p. 11), in connection with their unsuccessful request for a temporary restraining order, plaintiffs allege: "Once a schedule becomes effective there is considerable doubt whether in a subsequent setting aside of the Commission's order could, in law, have the effect of cancelling the schedules."

With this allegation we agree. The Commission's power to set aside rates already in effect is limited by the restrictions of Section 15(1) of the Interstate Commerce Act [49 U. S. C. 15(1)], including the requirements of a "full-hearing." To compel the Commission to take such action without such a hearing would be to compel it to disregard the limitations on its authority. The grant of power to the Commission to suspend rates *prior* to their effective date,

was itself a radical innovation in transportation law. It represented, as already noted, an exception to the traditional right of carriers to initiate their own rates. The effect of the District Court decision is to suspend rates *after* they have gone into effect, but before a "full hearing." Since the step is obviously beyond the limitation of the Commission's authority, it must naturally follow that it is likewise beyond the power of the Court.

In essence, the Court is engaged in the making of rates which have been universally recognized as beyond the scope of judicial power. If the Court's opinion is permitted to stand it will give impetus to innumerable court actions to test the validity of thousands of cases in which the Commission suspended or refused to suspend rates. In addition, none of the hundreds of those carrier-made rates filed each year (69th Annual Report of the Commission, p. 101) could be relied upon as a legal charge until they have been tested in the courts. The impact of such a situation upon the transportation industry and the business world would be disastrous.

This case well illustrates one of the dangers implicit in such a far-reaching doctrine. The lower court's judgment entered January 24, 1956, sets aside the Commission's order of November 14, 1955, as "void *ab initio*." The result of this judgment is that for over nine weeks the intervening railroads collected freight charges below the legal

rate, and that these railroads are now obligated under the Elkins Act to collect from its shippers for undercharges, i.e. the difference between the charges actually paid and the higher rate previously in force, 49 U. S. C. Sec. 41, et seq. The sales price of the commodity has reflected what was believed to have been the correct transportation charges. If the lower court is correct that the higher rate should prevail, then assuredly the sales prices have been too low. If the carrier proceeds against the shipper for undercharges, it is unlikely he has any way of readjusting his past prices for sales already made to reflect the higher transportation charges. Moreover, if reductions in the rates are postponed as they have been by the lower court's decision, and it is later found that the plaintiffs had no basis for their position, there is no way to compensate the shipper or receiver for having had to pay the higher rate. Since, therefore, the question of the correctness of the intervening charges depends entirely on the validity of the lower court's decision, the expiration of the period of suspension and the effectiveness of the schedules does not render the case moot.

It is submitted that the decision of the District Court fails to recognize the plenary authority granted to the Commission by the Interstate Commerce Act to grant or deny suspension of new rates, that it misconstrues and misapplies the provisions of the Administrative Procedure Act, and that it exceeds the scope of judicial power by engaging

in the making of rates with seriously disruptive effects upon the transportation industry and the business world. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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Of Counsel.
WM. R. MC DOWELL,
May 18, 1956

PROOF OF SERVICE

I, J. T. Suggs, one of the Attorneys for the Southwestern Railroads, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 25th day of May, 1956, I served copy of the foregoing Statement as to Jurisdiction on the several parties thereto as follows:

1. Amarillo-Borger Express, Inc., Best Motor Freight, Knaus Truck Lines, Inc., Leeway Motor Freight, Inc., Merchant's Fast Motor Lines, Inc., Strickland Transportation Company, Inc., Sunset Motor Lines, Inc., Yellow Transit Freight Lines, Inc., Plaintiffs, by mailing a copy in a duly addressed envelope with first-class postage prepaid to their Attorney of Record, Ralph W. Currie, Esq., at his office in the Praetorian Building, Dallas 2, Texas.

2. On the United States by leaving a copy thereof at the office of Heard L. Floore, Esq., United States Attorney for the Northern District of Texas, at his office in the Federal Building at Dallas, Texas, and by mailing a copy in a duly addressed envelope with air-mail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

3. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope, with air-mail postage prepaid to Robert W. Ginnane, Esq., its Chief Counsel, at the office of the Commission, Washington 25, D. C.

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